IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 98.

IDA RALSTON, Appellant,

vs.

George B. Turpin as Trustee, Etc., et al.

Appeal from the Circuit Court of the United States, for the Southern District of Georgia.

ABSTRACT AND BRIEF OF

CLIFFORD ANDERSON,

Counsel for Appellant.

IDA RALSTON, APPELLANT,

VS.

George B. Turpin, Trustee, Etc., et al.,

APPELLEES.

Appeal from the Circuit Court of the United States for the Southern District of Georgia, Western Division.

Case No. 98—October Term, 1888.

ABSTRACT AND BRIEF FOR APPELLANT.

Ida Ralston filed her bill against George B. Turpin, as trustee for certain of his children, to cancel certain deeds of gift to real property located in the City of Macon, Georgia, which had been executed by her husband, James A. Ralston, Jr., in his lifetime (he being now dead) and by herself, to said Turpin, as trustee, as aforesaid. She prayed that said deeds should be cancelled on three grounds, namely:

First. Because she claimed that her said husband, when he executed said deeds, which were based upon no valuable consideration, was mentally incapable of making a valid contract, and therefore did not have mental capacity to make said deeds of gift.

Second. That said deeds of gift were procured by the undue influence and persuasion of the said George B. Turpin, who, at the time said deeds were made, was the business agent and had been the guardian of the said James A. Ralston, Jr., and had been also the sole executor of the last will and testament of the mother of the said Jas. A. and the trusted friend of the said James A.'s father, in his lifetime, and that said deeds were therefore executed during the existence of confidential relations between the said James A. Ralston, Jr., and the said George B. Turpin.

Third. Because she claimed that her consent to the execution of said deeds was given because, knowing the influence of the said Turpin over her said husband, she feared that if she refused, that he would endeavor to bring about a separation between her and her said husband, or render their relations with each other insecure and unhappy; and was caused also by the fact that the said Turpin being in charge of all her husband's property and business affairs, she felt that they were both largely dependent on his favor and good will. She further alleged that she was at that time ignorant of the fact that said deeds of gift embraced by far the most valuable part of her husband's remaining property. She also alleged that when said deeds were executed, she and her husband were so completely under the influence of the said Turpin, and so anxious to conciliate and gratify him, that they did not stop to consider the character or effect of the paper they were asked to execute.

The defendant, Turpin, trustee as aforesaid, answered the bill, denying in his answer, the incapacity of James A. Ralston, Jr., and also denying that the deeds of gift were procured by the exercise of undue influence by him over the said James A. Ralston, Jr., or his said wife. On the contrary he stated that the execution of said deeds was made voluntarily by both the said Ralston and his wife, and in pursuance of a purpose long contemplated by the said James A. Ralston, to give a portion of his, the said Ralston's property, to the said Turpin or his children, at his, the said Ralston's death.

Much testimony was introduced by both parties on the trial of said case before the Honorable Emory Speer, District Judge of the United States for the Southern District of Georgia, presiding in and holding the Circuit Court for the Western Division of said District.

In the progress of the trial the complainant offered in evidence a certified copy of the last will of James A. Ralston, Jr., of her petition as his widow and sole legatee, for the probate thereof in the Surrogate's Court of the County and State of New York, of the caveat filed thereto by Mrs. Laura R. Smith, an aunt of the deceased testator, and of the judgment of the said Surrogate's Court refusing the probate of said will and declaring it null and void—all embraced in an exemplification from the Records of said Court. The Court, on motion of defendant's counsel, rejected the evidence so offered, on the ground that defendants not having been parties to said proceedings in said Surrogate's Court, were not bound or affected thereby. To which ruling of the Court the complainant, by her counsel, excepted.

Defendant's counsel having in that connection directed the Court's attention to the fact that a certified copy of said proceedings had been attached to an amendment of the bill made by complainant during the progress of the trial, as an exhibit to said amendment, the Court, on motion of defendant's counsel, ordered said certified copy of said proceedings, to-wit, of the petition of complainant to probate said will, of the caveat thereto, and of the judgment of the Surrogate's Court, should be stricken from said exhibit. To which decision coun el for complainant also excepted.

The Court, after considering the evidence submitted and the argument of counsel, made a decree denying the prayers of said bill, and dismissing said bill at the cost of the complainant. To which decree counsel for complainant also excepted, and thereupon entered an appeal, which was duly allowed, to the Supreme Court of the United States.

In the prosecution of said appeal counsel for complainant now assigns error in the rulings and decree made by said Circuit Court as follows, to-wit:

First. That said Court erred in refusing to admit in evidence the exemplification from the Surrogate's Court for the County and State of New York, embracing a certified copy of the last will of the said James A. Ralston, Jr., of the petition of said Ida Ralston, his widow, for the probate thereof of the caveat filed thereto by Mrs. Laura R. Smith, and of the judgment of said Surrogate's Court refusing the probate of said will.

Second. That said Circuit Court erred in ordering the certified copy of the petition of the complainant to probate the last will of the said James A. Ralston, Jr., and of the caveat thereto, and of the judgment of the Surrogate's Court of the County and State of New York, thereon, to be stricken from the exhibit attached to complainant's amended bill.

Third. That said Circuit Court erred in deciding and decreeing that said James A. Ralston, Jr., had sufficient mental capacity to make each and all of the deeds of gift executed by him to the said George B. Turpin, trustee, etc., and which said complainant's bill prayed should be cancelled at the time of the execution of each of said deeds.

Fourth. That the said Circuit Court erred in deciding and decreeing that all of said deeds of gift referred to and sought to be cancelled by complainant's said bill, were freely, voluntarily and legally

executed by the said James A. Ralston, Jr., and by the said complainant, his wife, and that none of said deeds of gift were procured by the persuasion and undue influence of the said George B. Turpin over the said James A. Ralston, Jr., or his said wife, or either of them.

Fifth. That the said Circuit Court erred in deciding and decreeing that said deeds of gift were valid, and especially the deed of gift last executed by the said James A. Ralston, Jr., and his wife, to the said George B. Turpin, as trustee for his said children.

Sixth. That the said Circuit Court erred in decreeing that the prayers of the bill should be denied, and that the bill should be dismissed with costs.

Seventh. That the said Circuit Court erred in not decreeing that each and all of said deeds of gift should be cancelled on each of the grounds on which their cancellation was prayed, and their validity attacked in said bill.

In support of the foregoing assignments it is claimed, first, that said exemplification from the Surrogate's Court should have been allowed to stand as an exhibit to said amended bill, and should have been admitted in evidence.

(*a.*) It was relevant evidence to prove that James A. Ralston, Jr., died intestate.

(*b.*) It was relevant evidence to show that the executors appointed by the will of James A. Balston, Jr., were not proper parties to the pending bill, the will having been declared by the judgment of a competent Court to be null and void.

2d. The deeds of gift are shown to have been made when the donor (Ralston) was incompetent to make them. This is proven by two physicians, (one of them, Dr. Wylie, one of the most eminent in the City of New York,) and by a number of other witnesses, who saw him in all the relations of life during the years 1880 and 1881. Dr. Wylie's evidence is very strong and shows that Ralston's mind had been so impaired by dissipation that, even when sober, he was mentally incompetent. (See printed Record, pages 112, 113, 114 to 117, and also 73 to 83. See 11th Wheat., 103; 4th Otto, 506.)

3d. The relation of principal and agent is a confidential relation—so declared by the law of this State, where this property lies. See Code of Ga., Sec. 3177, which reads as follows: "Any relations shall be deemed confidential arising from nature or created by law, or resulting from contracts, where one party is so situated as to exer-

cise a controlling influence over the will, conduct and interest of another; or where, from similar relations of mutual confidence, the law requires the utmost good faith, such as partners, principal and agent, etc." It is also so declared in elementary works and judicial decisions relating to this class of cases. Kerr on Fr. and Mis., 172; 2d, Pom. on Eq. Jnr., Sec. 951; 1st. Story's Eq. Jnr., Sec. 315, Hunter vs. Atkyns; 8th. En. Chan. R. 303 (particularly pp. 314–15;) 5th. Blackford's (Ind.) R. 509; 15th Vesey, Jr., p. 34 and notes.

4th. Turpin was the trusted confidential agent of the donor (Ralston.) He had been Ralston's chosen guardian and the testimony of Turpin and Orr shows (see pages 143 to 147, printed Record, and also p. 206) that though the relation of guardian and ward has *formally* terminated by Ralston's arriving at majority, the actual relation did not terminate, but continued. They testify in substance, that when Ralston arrived at age he did not take his property or his business affairs out of Turpin's hands, ("he did not move anything," says Turpin;) and Turpin testifies that, although Ralston charged Turpin & Ogden, *nominally*, with his business and the management of his property, he looked *specially* to Turpin to take care of his interests and to manage his affairs. In addition *all* the witnesses sworn on this subject, testify that Turpin's *influence over Ralston* was almost unbounded, and that Ralston had the most *implicit confidence* in Turpin. No one testifies to this influence more strongly than Orr, (one of the book-keepers of Turpin & Ogden,) and Herbert Brown, (an intimate friend of Ralston, whose testimony was taken at Turpin's instance,) and T. L. Massenburg, (another witness offered by respondent and a co-executor with Turpin of the last will of Ralston.)

These witnesses state that the influence of Turpin over Ralston, was like that of a *father* over a *son*, and some of the witnesses say that Ralston spoke of Turpin as a *second father*.

There can be no doubt whatever, therefore, that relations of confidence and influence did *actually exist*, and the evidence fully justifies the inference that a request from Turpin was equivalent to a command in its influence and effect on Ralston.

5th. The deeds were not the voluntary suggestion and act of Ralston, but were the suggestion of Turpin and brought about by his agency, solicitation and influence.

(*a.*) Turpin had the first deed drawn by his own attorney *before*

he even inquired of Ralston whether he was willing to make such a deed. This, alone, is a badge of fraud. See note 2 to case of Harris vs. Tremenhure. 15th. Vesey, Jr., page 42.

(*b.*) Turpin *went in pursuit* of Ralston, to Ralston's residence in Connecticut, *carrying* the first deed, *already prepared*, in his pocket.

(*c.*) It is a somewhat remarkable, if not significant circumstance that Ogden, his partner, accompanied Turpin to Ralston's place of residence, with full knowledge that Turpin had the deed ready and was carrying it with him.

(*d*) Ogden not only goes with Turpin to Stamford but actively assists in having the first deed executed.

(*e*) Either Ogden or Turpin are with Ralston and wife all the time until the first deed is executed.

(*f*) Turpin not only goes after Ralston with a *prepared* deed in his pocket, but he *solicits* Ralston to sign it.

(*g*) Turpin not only solicits, but he uses persuasive means to get Ralston to sign the deed. He reminds Ralston that he promised his mother to provide for his (Turpin's) children in his (Ralston's) *will*, for the purpose of inducing him to execute *the deed*. Mrs. Ralston testifies this, and Turpin, although examined as a witness since, does not deny that he made this statement. Nor does he deny (but says he does not remember) stating to Ralston, as another inducement to him to sign the deed, that the property on Third Street (in Macon, Ga.,) was more valuable than that on Cherry Street. He admits that he stated to Ralston, as another inducement to sign the deed, that the will he had made in favor of Turpin's children was of "no good." How can it then be said that Turpin used *no persuasion* to get the deed executed? What persuasive means were more likely to affect young Ralston than to claim that he had promised his mother on her death-bed; of which there is no evidence, Turpin only testifying, on this point, that Mrs. Bozeman (young Ralston's mother) had told him (Turpin) that "she would have remembered him in her will but that Jimmie either had or would do so in his." The statement as to the comparative value of the Third and Cherry street property is shown by the evidence of Turpin's book-keeper, (Block,) and his son-in-law, (Horne) to be incorrect, for Block says the Cherry street, property was then worth from $40.000.00 to $50,000.00 and the Third street property from $35,000.00 to $40,000.00. It is proved, therefore, that solicitation and persuasion *were* used by Turpin, and that statements were made which were not true. Says Lord Eldon, in 15th

Vesey, Jr., p. 38, "If I could find in the answer or the evidence the *slightest hint* that the defendant laid before the testator any account of the value of the premises, that was *not perfectly accurate*, that would induce me to set them aside, whatever the parties intend, upon the general ground that the principal never would be safe, if the agent could take a gift from him upon the representation that was not most accurate and precise."

See the Code of Georgia, Sec. 2666; 14th Vesey, Jr., 273; Hunter vs. Atkyns, 8th En. Ch. R. R., 303, (particularly 315) 11th Wheat., 103; 4th Otto, 506; Kerr no Fr.; 4 Mis., 172; 5th Blackford's R., 509.

Section 2666 of the Code of Georgia reads as follows: "A gift by any person just arriving at majority, or otherwise peculiarly subject to be affected by such influences, to his parent, guardian, trustee, attorney, or other person standing in a similar relation of confidence, shall be scrutinized with great jealousy, and upon the slightest evidence of persuasion or influence toward this object, shall be declared void, at the instance of the donor or his legal representative, at any time within five years after the making of such gift."

(*h*) Turpin, to induce Ralston to make the first deed, admits that he *may* have paid the expenses of Ralston and wife to Bridgeport and New York to get a Commissioner of Georgia to witness it; also the fees of the Commissioner for attesting it.

(*i*) Turpin still had Ralston's property and the latter *leaned* on him as on a father, and looked to him for money, and help in trouble.

(*j*) Ralston and wife were, at the time, living in a new community, and leading a new and different life, associating with the best people of the place. Turpin could have destroyed their character with a breath. Mrs. Ralston, particularly, and doubtless Ralston as well, would have preferred to have made even a larger gift than to have had her past life exposed.

(*k*) Turpin not only did not call in a third person to advise Ralston but he kept him and his wife under surveillance until the first deed was signed.

(*l*) The second and third deeds followed as a matter of course after the first had been made. Besides, if the first was obtained by improper influences, the authorities are to the effect that the subsequent ones cannot be sustained unless the donee shows not only that the influences which resulted in the first had been removed, but that the donors signed the others deliberately with full knowledge that the first

was voidable and could be set aside. See authorities cited by Sir Samuel Romily in Hugenin vs. Basely, 14th Vesey, Jr., 273; 5th Blackford's R., 509; Falls vs. Carpenter, 28th Amer. Dec., 592.

(*m*) It was not explained to Ralston or his wife, that whilst the wills he had made were revocable, the deeds were *irrevocable*, and in the then condition of Ralston's mind, the inference is irresistible that he did not know or appreciate this difference. In Hugenin vs. Baseley, although the Attorney did explain to the donor that the deed she was about to make was irrevocable, and advised her to make a will, Lord Eldon held that she did not understand the transaction, and that the Attorney did not as fully instruct her in relation to it as should have been done. If that was so, what shall be said of a transaction in which no explanation of the nature of the instrument, especially as to its irrevocable character, was given?

(*n*.) More than nine months after the deeds of August 26th and August 28th, 1880, were made, the learned counsel for Turpin (Mr. Bacon) was sufficiently doubtful whether those deeds (so-called) were in reality deeds or testamentary in their character, as to advise the execution of another deed. How can it be supposed, then, that either Ralston, with his then imbecile intellect, or his wife understood their legal purport or effect?

(*o*.) The fact that these deeds, and especially the first two, were made so soon after Ralston's marriage that it was impossible to know whether there would be children of that marriage, shows both the power and influence of Turpin, and the unnaturalness and unreasonableness of the gift. Besides, the evidence shows that Ralston then had living five aunts, three of whom had children. One of these aunts, his letters show, was very poor and had been, in a measure, dependent on him. The testimony of another aunt (Mrs. Hayne Ellis) shows that when he lived in Macon, Georgia, he had a room at her house and lived with her.

(*p*) Turpin did not explain to Ralston or his wife what the alleged "informality" in either the deed of August 26th, 1880, was which caused him to request the execution of that of August 28th, 1880, nor what the alleged "informality" in the two deeds was which caused him to request the execution of the deed of April 19th, 1881. Good faith from one standing in his position towards Ralston and seeking his bounty, required that he should have dealt with him in the utmost candor and fairness. He should have informed Ralston what the alleged defects or "informalities" were, so that Ralston,

with a full understanding of the facts, could have deliberately decided whether he would remove such defects. All the authorities are to the effect that if he withheld such information he cannot hold the gift thus procured. The fact that Ralston signed without such information, shows that either he acted ignorantly, or that Turpin's power over him was irresistible.

(*q*) The fact that so many deeds were made, tends to show all the more strongly the influence of Turpin over Ralston, in the language of Chief Justice Wilmot (in Bridgman vs Green 2d, Vesey, 627) "the deep-rooted influence obtained over him," for as he adds, "the same power which produces one produces the other."

(*r*) The fact that Ralston had previously made wills in favor of Turpin's children, did not justify Turpin in soliciting an irrevocable deed of gift or a gift at all, especially as Ralston's condition in life had been changed by his marriage and the possibility of offspring.

(*s*) Mrs. Ralston's relinquishment had no other legal effect than to relinquish dower, as she had no other interest, then, in the property; and her relinquishment for that purpose was wholly unnecessary. The fact that it was procured, shows the active and determined efforts Turpin made to get these gifts, and that they were not the voluntary suggestions and acts of the donors. In the cases where gifts have been upheld, they were first *proposed*, as well as made, by the donors, not by the donee—as, for example in Hunter vs Atkyns, 8th En., Ch. R., 303 and in 15th, Vesey, Jr., 34, decided, respectively, by Lords Brougham and Eldon. Moreover, a wife's joining in such a deed amounts to nothing, if the deed is not valid as between the husband and the grantees. See on this subject, 16th Amer., R., 459; 49th N. Y., 111; 23d Ohio, St., 294; 62d Main, 280, 10th Amer., R., 335; 13th Do.; 251. I have not had access to these cases, but cite them because of references in digests.

5th. The fact that Ralston made wills, when he was a single man, does not prove that these deeds were voluntary and of his own free suggestion. Even if he did make wills and declare, when single that Turpin should have his property when he died, he should have been left, *unsolicited and unpersuaded to propose* these gifts after his marriage. He never had made an *irrevocable* deed, nor did he make one until *Turpin asked* and *solicited* it, nor had he ever declared his purpose or intention to make *such a deed*. The making of *such an instrument* was *first suggested and proposed by Turpin*. Is there a case in the books where *such a deed* was *ever allowed to stand*, after *being*

first suggested and *proposed* by the *donee?* especially, where the donee not only first proposed it, but *had it prepared by his own lawyer* and then *carried or sent it to the donor?*

The evidence shows that James A. Ralston, Jr., believed himself to be under deep obligation to George B. Turpin, for the judicious and successful manner in which the latter had managed the former's property. That this was a delusion on the part of Ralston is apparent, from the following considerations:

(*a*) Ralston's property, under Turpin's management, had constantly diminished. No new investments were made, although the income was large. Reduction and not increase characterized the management from the beginning to the end.

(*b*) Turpin was well paid for all he did. He charged and received for his management about the same commissions he got from others whose property approximated in value that belonging to Ralston. A careful analysis of the evidence shows that Turpin's compensation was quite liberal, and that Ralston was one of the most valuable customers the firm of Turpin & Ogden had.

Again, Turpin did not deal fairly with Ralston in the following particulars:

(*a*) Whilst he told him that his marriage rendered invalid the will Ralston had made in favor of Turpin's children, he did not inform him that whilst the will had always been revocable, the deed he procured from Ralston dated in April 1881 was *irrevocable.*

(*b*) He did not explain to Ralston the difference between the first two deeds made in 1880, and the deed of April 1881. He tells him it (the latter deed) "is the same thing, only * * informal." (See page 283, printed Record.)

There was no informality about the execution of the deed nor in any other respect. The only difference, if there was any, was between the *effect* of that deed and the two former deeds; the latter being testamentary in their character and the other not. It is evident that Turpin's attorney thought there was this difference, but Turpin did not so inform Ralston.

The first two deeds were testamentary in their character, it is respectfully insisted, because under them, the title did not vest in Turpin as trustee until after Ralston's death. See Arnold et al. vs. Arnold et al., 62 Ga., 627 (4th head-note); Brewer, admr., vs. Baxter et al., 41 Ga., 212.

(*c*) He told Ralston that the Third street property, that being the

property not embraced in the deeds of gift, was more valuable than the Cherry street property. See Mrs. Ralston's evidence on page 95 of printed Record. Turpin, although examined after Mrs. Ralston's testimony was given, does not deny that he made this statement. He says he does not remember making it. (See page 210, printed Record.)

The statement was not true. (See evidence of Aleck Block on page 200, printed Record.

It is deemed unnecessary to cite authority to show that the instruments sought to be cancelled, having for their object the conveyance of real property in Georgia, are governed by the laws of that State.

There is, we respectfully claim, an overwhelming preponderance of evidence in favor of Ralston's mental incapacity at the time the instruments (especially that of April 19th, 1881) were executed; and and that the evidence of the defendant, Turpin, himself, shows that they were procured by his persuasion and influence. There is certainly, we think, no room for doubt on this point when all the evidence is examined and considered.

CLIFFORD ANDERSON,
Counsel for Appellant.

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Clerk.

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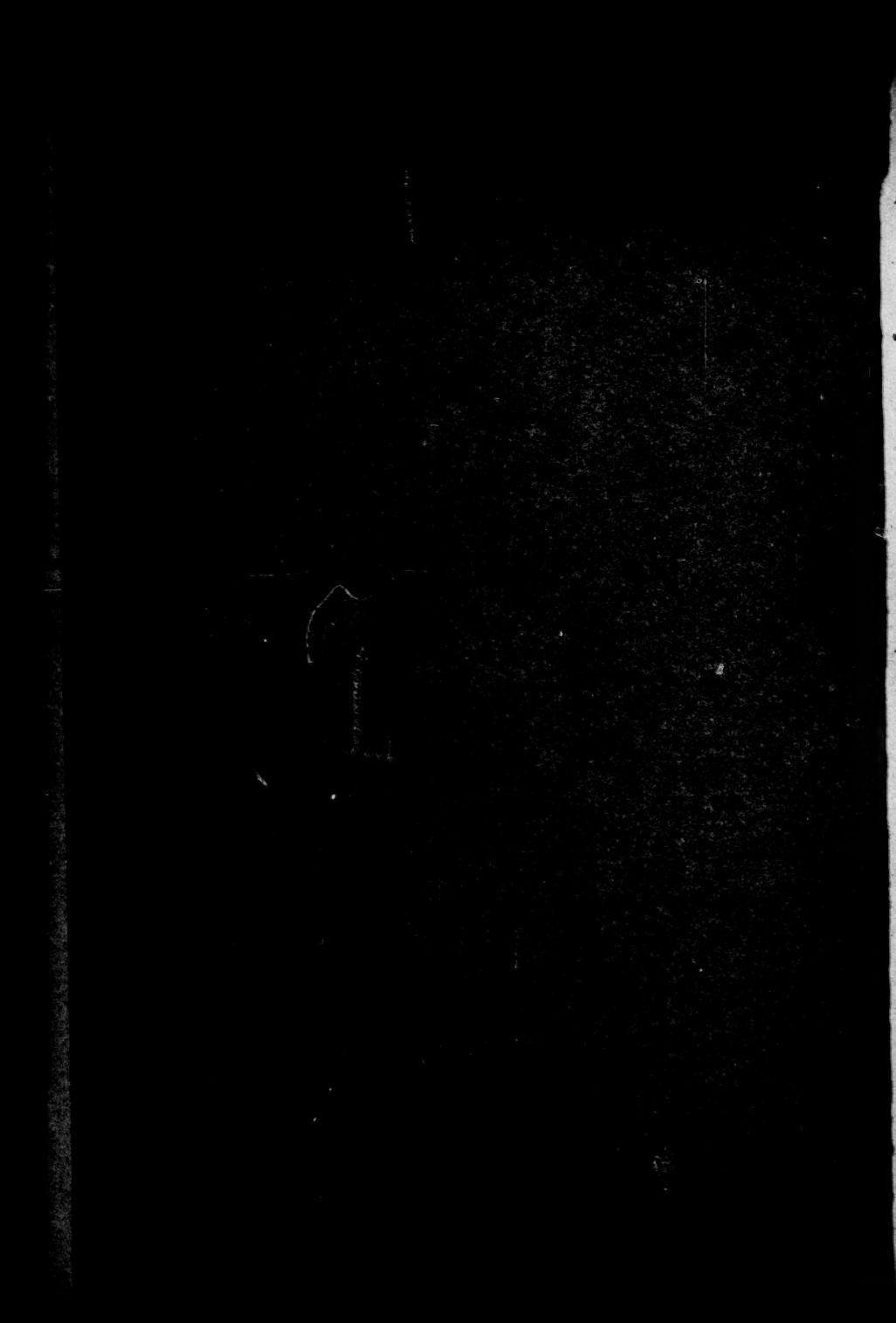

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WASHINGTON DESSAU,
Counsel for Appellant.

JAMES H. OLMSTEAD, of Stamford, Conn., swore that he met Ralston at the latter's home, in Stamford, in March, 1881. Ralston had the appearance of being perfectly sober. He seemed to be very weak and childish. Witness told Ralston that if Ralston made any conveyance of his property in his present condition witness did not believe it would be worth the paper it was written on. This was in

reply to an offer to make over all his property to his wife. From his general appearance and his actions witness at that time came to the conclusion that his mind, and especially his will-power, was a complete wreck. Witness is a lawyer; has had six or seven will cases involving mental soundness; has prosecuted, as prosecuting attorney of Fairfield county, four or five persons for murder in which the defense was insanity, and has made a pretty thorough study of the brain and nervous system. (Record, pages 73, 74, 75, and 76.)

SARAH A. HUBBARD, of Stamford, Conn., swears:

Knew Ralston from April 1st, 1880, to April 1st, 1881; do not think that at any time he was capable of transacting business; when not under the influence of liquor never knew him to be able to converse intelligently and connectedly about even ordinary matters. His physical and mental condition seemed very weak at all times. He was excessively drunk most of the time (Record, page 77). Witness does not know his condition at the time he signed the deeds (Record, page 78). Witness saw him almost every day during the year he lived in Stamford. In speaking of his mental condition as weak witness refers both to the time when he was drinking and when he was sober. (Record, page 78.)

HENRY A. HUBBARD, of Stamford, Conn., swears:

Knew Ralston in the spring of 1880; he lived in one of my houses for a year; he did not live a sober and temperate life; he was physically and mentally shattered. When not intoxicated there were but few times during the year that I knew him when he seemed to be in a fit condition to do business. He was in my office, on an average, once a week during this time (Record, page 79). I would not judge Ralston to be a capable business man or fit to do business as men ordinarily do; do not know Ralston's condition at the time he signed the deeds. (Record, page 80.)

LEWIS R. HURLBUT, of Stamford, Conn., swears:

Witness is a physician; knew Ralston during part of the years 1880 and 1881. He was weakened both physically and mentally by his habits; it was plain to me as a physician that he was a very intemperate man and very much broken down physically and mentally by his intemperate habits. He was not, in my judgment, during the time I knew him, capable, mentally, to attend to or transact business as men ordinarily attend to their business. Witness has been in regular practice for nearly thirty-three years (Record, page 81). His condition when witness knew him, both mentally and physically, could only have been the result of a long-continued course of dissipation. (Record, page 82.)

I do not know anything about his particular condition at the time he signed the deeds, but if the deeds referred to were signed about the time I knew him or afterwards he could not have been a sound man, mentally and physically, at the time he signed them. I refer to his general mental condition, both drunk and sober. (Record, page 82.)

PATRICK MCCARTHY, of Stamford, Conn., swears:

Knew Ralston from spring to fall of 1880; he acted to me as if he was crazy. Even when not intoxicated he acted like a crazy man; his mind was so weak that one could twist him around his finger, whether he was drunk or sober; he was a person of weak mind (Record, page 83); do not know his condition at the time he signed the deeds. I refer to his mental condition both when he was drinking and when sober. (Record, page 84.)

IDA RALSTON (appellant) swore:

His mind was weakened from the use of liquor; he was physically helpless (Record, page 96). At the time of the second deed he was drinking all the time. As to the sec-

ond deed, I was told by Mr. Ralston that, as I had signed the first deed, I must sign the second; if I did not, he told me, I would not be his wife any longer than five hours. (Record, page 97.)

JOHN O. BRINTNALL, of New York, swears:

I met Ralston in the summer of 1880; saw him almost every day; saw him drunk a number of times; hardly ever sober (Record, page 108). In the years 1880 and 1881 his mind was thick, I think; I know it had been impaired by the use of liquor; don't think he was capable of doing any business in '80 and '81, because of his drinking habits, for when he was sober he was getting over his drunk. (Record, page 109.)

MARGARET O'BRIEN ("Sister Margaret") swears:

Was acquainted with him five years previous to his death; would call him an habitual drunkard (Record, page 110). In 1880, 1881, and 1882 his mind appeared to be all right; it had not been impaired, so far as I know of. He was very seldom sober during that time. He was not capable of business because of his drunkenness, in 1880, 1881, and 1882. I do not know whether he was capable—I think he was not—of managing his property or properly disposing of it as persons ordinarily do. (Record, page 111.)

W. GILL WYLIE, of New York, swears:

Am a physician; knew Ralston for three or four years before his death, and saw him frequently. He used intoxicating liquors almost habitually, excessively at times. The greater part of the time he did not have a proper conception of the value of property. In 1880, 1881, and 1882 at times his mind might have been clear, but about 1880 his mind was greatly weakened by the use of liquors. I should not think he was capable of engaging in business; this was true during 1880, 1881, and 1882. He was in a condition that made him liable

to imposition by others, * * * and he was incapable of transacting business or managing his property or placing a proper estimate on property as persons ordinarily do. Have practiced medicine about fifteen years. (Record, page 112.)

A servant named Joe had influence over him, and any one who was brought in contact with him seem to influence him. When he was not intoxicated he showed the effects of liquor. He bought a carriage and horses for a large sum, and after a few months sold them, realizing forty-two dollars. This was eighteen months or two years before his death. (Record, page 113.)

WILLIAM R. PRYOR, of New York, swears:

First met him December 19, 1882, and saw him last on June 6, 1883. He was suffering from acute alcoholism. He was very weak mentally in 1882. He was not capable of attending to business when I knew him. I have practiced medicine four years (Record, page 114). Judging from the analysis of his character I made, he was liable to be imposed on. (Record, page 115.)

HORACE E. JONES, of New York, swears:

Knew Ralston seven or eight years ago or longer (Record, page 115). He did not seem to know the value of money or property. I don't think he was capable of attending to any business, because he was too much under the influence of liquor. In 1880, 1881, and 1882 he was as bad as in any year I knew him. He was not capable of managing property or transacting business or of placing a proper estimate on property or of prudently disposing of it as persons ordinarily do, during those years, except sometimes when he was sober he was more cautious. (Record, page 116.)

JOHN SHEERAN, of New York, swears:

Knew Ralston four or five years; would see him two or three times a week, and he was always under the influence of liquor, and sometimes considerably so (Record, page 117). He was rarely sober during the years 1880, 1881, and 1882, and this excessive use of liquor weakened him physically and mentally. I do not think he was capable of doing business during those years. (Record, page 118.)

Mrs. HAYNE ELLIS, of Macon, Ga., swore:

Ralston was my nephew. He drank a great deal. I do not think anybody in this room would have allowed him to attend to their business for them. I don't think they would have considered him capable of attending to any at all. (Record, page 182.)

W. D. PALMER, of Macon, Ga., swore:

Knew Ralston 18 or 19 years. I do not think he ever attended to any business. He drank a great deal. I think he would drink to an extent to incapacitate him from attending to business. (Record, pages 186 and 187.)

For the Defendant (Appellee).

A PROUDFIT, of Macon, swore:

Knew Ralston since 1869 (Record, page 127); saw him sign the deed of August 28, 1880. He was perfectly sober (Record, page 128). He said if it had not been for Mr. Turpin he wouldn't have anything. Turpin preserved his property for him. He was perfectly rational. He took the papers and read them. The notary asked him the questions you will find on that deed (Record, page 129). When I speak of the commissioner interrogating Ralston I mean Mrs. Ralston. I don't remember whether the commissioner asked him if he understood the nature of the deed. This was the

last time I saw Ralston (Record, page 130). I had no conversation with him before that day about this business. (Record, page 133.)

W. H. Ross, of Macon, swore:

I was in New York about the 28th of August, 1880, and saw Ralston. I had not heard that the deed had been signed when I saw him then. He was perfectly rational. I did not have but one conversation with him particularly (Record, page 135). Much to my surprise, he was sober—perfectly sober. (Record, page 136.)

A. J. Orr, of Macon, swore:

Knew Ralston after 1868 and quite intimately for two or three years after that (Record, page 144). After that time I do not know what his habits were about drinking. (Record, page 146.)

J. E. Jones, of Macon, swore:

I only know from what I saw of the young man (meaning Ralston) that he wouldn't have had a dollar if it had not been for George Turpin. I wouldn't have been bothered with him for all he was worth. I have seen him in New York worrying Turpin. I helped Turpin raise money then to give him when he was on drunken sprees. His habits were bad (Record, page 147). I helped Turpin raise the money in latter part of '79. I saw him once after that, in New York, drinking.

Question. What sort of capacity did he have for business?

Answer. I don't know.

Question. Did he have any?

Answer. I don't know. I should think he had when he was sober. He was a smart fellow. When he was drinking I don't think he had capacity; when he was sober he had

capacity. I never heard of his investing any money. I never had any business transaction with him. (Record, page 148.)

O. F. ADAMS, of Macon, swore:

Knew James Ralston up to the time he left for New York; don't think I ever saw him drunk. I never saw him at the North. (Record, page 149.)

H. R. BROWN, of Macon, was sworn for defendants, but complainant introduced his testimony taken before the examiner:

Knew Ralston for 20 years (Record, page 153); met him once in New York after he left Macon. This was about a year and a half or two years before his death. His health had been very much impaired by drinking (Record, page 158). He appeared feeble at this time. I thought he was losing a good deal of his sense. He didn't seem to be the same man at all. He was impaired mentally as well as physically. (Record, page 159.)

W. A. WYLLY, of Macon, swore:

Knew Ralston from 1863 up to time he left to live in New York (Record, page 161). I never saw him after his marriage. (Record, page 162.)

J. W. HINES, of Macon, swore:

Knew Ralston for 25 years (Record, page 163). I think he was a rational man. I didn't look upon him as a man that was insane or anything of that kind (Record, page 164). This was a good while before he went to New York. (Record, page 165.)

ALEX. BLOCK, of Macon, swore:

Knew Ralson 15 or 18 years. Have been connected with Turpin & Ogden for 14 years; saw Ralston nearly every day

for six or eight years, until he went to New York; saw him in New York on two or three occasions; spent ten days with him in '81 in Catskill Mountains (Record, page 167); this was in July, 1881. He was as straight as any man I know of. He was rational, in the possession of his mental faculties, and perfectly sober. I do not think I saw him in '80. (Record, page 169.)

SAM. BAER, of Macon, swore:

Knew Ralston since '65; met him in '76 in New York. (Record, page 174.)

W. F. HOLT, of Macon, swore:

Have been practicing medicine 28 years; knew Ralston from his boyhood (Record, page 175). I would call him a dissipated man. I know nothing about his business habits at all. (Record, page 176.)

T. L. MASSENBURG, of Macon, swore:

Knew Ralston since he was a small boy. He used stimulants frequently. Turpin & Ogden always paid the bills he made with me; never saw Ralston after his marriage. (Record, page 193.)

C. E. DAMOUR, of Macon, swore:

Knew Ralston from boyhood; did not talk with him upon his private affairs; have not seen him since 1878. (Record, page 194.)

A. O. BACON, of Macon, swore:

Knew Ralston; drew will of 1874 at his request and employment. He was perfectly sober and rational. (Record, page 195.)

SOLOMON WAXELBAUM, of Macon, swore:

Knew Ralston in Macon and New York; met him several times in New York—the last time in 1882. I expect I saw him in 1879, 1880, and 1881, but do not recollect distinctly. Probably met him in passing, but had no conversation that I recollect. He seemed to be in good mind and talked as sensibly as any other man would. This was in 1882. The conversation in 1882 lasted from five to ten minutes. (Record, page 199.)

A. BLOCK, of Macon, re-examined, swore:

Witnessed will of 1874; suppose he was sober, as Turpin never allowed him to do any business when he was not sober. (Record, page 199.)

HENRY HORNE, of Macon, swore:

Witnessed the will of 1879. Ralston was at himself and knew what he was doing when the will was executed. (Record, page 201.)

GEORGE B. TURPIN'S testimony, which is very voluminous, is to the effect that Ralston was not a very dissipated man, and that when sober he was rational. (Record, pages 205 to 216.)

J. M. OGDEN, of Macon, swore:

Ralston got me to take a memorandum of the will of 1879. When I returned to Macon I got Mr. Proudfit to draw the will (Record, page 216). I went with Turpin to Stamford in 1880. When I met Ralston at the commissioner's office, where the deed was signed, he was perfectly sober and rational (Record, pages 216, 217). I have been in partnership with Turpin since 1869.

JOHN H. DOBBS, of New York, swore:

Knew Ralston for 20 years, and saw him frequently in

New York and Macon; witnessed deed of June 30, 1882, from Ralston to his wife. When he signed it he was all right, so far as I know; was able to attend to business. He drank a great deal whilst witness knew him; had his sprees and sober days; had the capacity, but don't think he had the disposition, to attend to his business. (Record, pages 125 and 126.)

Extract from letter of June 29, 1880, of Ralston to Turpin:

In reference to back-house and roofs, borrow as much money as you want on dwelling on bill to fix up all as you wish it fixed. (Record, page 274.)

Extract from letter of July 28, 1880, of same to same:

Please send me 300 dollars by the 5th of August. (Record, page 275.)

Extract from letter of March 29, 1881, of same to same:

Will you please send me a check for 350 dollars? (Record, page 276.

Extract from letter of April 18, 1881, of same to same:

We expect to leave on the 27th, and will need 500 dollars. If you have not got it, will you please borrow it and I will pay the interest. (Record, page 277.)

Extract from letter of April 20, 1881, of same to same:

I wrote for 500 dollars. Please send it so I can pay up my bills and move to New York. If you send it Saturday night I will not get it until Tuesday. (Record, page 278.)

Extract from letter of April 27, 1881, of same to same:

Your kind letter received with enclosed check. * * * Try and let me have balance by May 5th. It took all you sent to see me through here.

The body of each of these letters was in the handwriting of Mrs. Ralston, but the signatures were in the handwriting of James A. Ralston.

The foregoing is a brief abstract of the evidence touching Ralston's mental capacity.

An abstract of the testimony on the other branches of the case is deemed unneccessary, as the influence of Turpin over Ralston is shown by the witnesses introduced by the defendant, and the influences brought to bear to procure the deeds are set forth in the evidence of Turpin himself and in those parts of Mrs. Ralston's evidence which he does not contradict.

James A. Ralston, Jr., left a will giving his entire estate to complainant, but the will has been set aside by the probate court in New York. Mrs. Ralston did not resist the caveat to her petition to prove the will, because, as she alleged, she being the sole heir-at-law of her husband, she had not sufficient interest in the will to justify her in resisting the caveat in the courts of New York. (See Record, p. 50.)

Had the deeds or instruments under which the appellee claims title been contracts advantageous to the grantor, a court of equity might confirm them for that reason, notwithstanding his incapacity. A contract not advantageous to the grantor cannot be upheld in a court of equity if the consideration is simply inadequate, in view of such evidence of the grantor's incapacity as is exhibited. What, then, shall be said, in the light of this evidence, of a contract based on no valuable consideration whatever—a mere gift?

We think we may safely assert that the books will be searched in vain for a precedent in favor of upholding such a contract.

A deed when made by a person of very weak mind or whose mental faculties have become greatly impaired by disease or other cause, if the consideration on which it is based is grossly inadequate, cannot be upheld in a court of equity. (Robinson *vs.* Schley *et al.*, 6th Ga., 515; Allore *vs.* Jewell, 94th U. S. Repts. (4th Otto.), 506.

A fortiori, a voluntary deed, a gift, especially when made to one who is not a relative either by blood or affinity, must be set aside.

But how does the case stand when the testimony of Ralston's incapacity is considered in connection with the evidence on the other branch of the case?

We must go back a quarter of a century to begin to trace and understand the remarkable influence which the evidence shows Turpin had acquired over young Ralston. Turpin was the trusted friend and agent of young Ralston's father. He bore similar relations to the young man's mother, and as far back as her lifetime the idea of Turpin's sharing the bounty of the family had taken shape. Mrs. Ralston, afterwards Mrs. Bozeman, was so deeply impressed with the notion that Turpin was seeking an interest in the family estates that she felt called upon to inform him that the reason she did not remember him in her will was that "Jimmie either had done or would do so in his" (See Record, p. 206). Young Ralston grew up under the influence of Turpin's expectations. The idea had been impressed on his childhood, and took such complete possession of him that he prattles to his companions (witnesses introduced by defendant), "What is the use of my being saving and taking care of my property, Turpin will get it all when I die." (See Record, pp. 155–'6.)

This he said when friends remonstrated with him about his extravagance and wastefulness.

Turpin had had it impressed on him (Ralston) almost from the cradle that he, Turpin, was to share, if not to monopolize, the family bounty, and Turpin kept him reminded of this fact as he grew up to manhood. Turpin testifies: "I did not solicit him to make the will (referring to the will of 1879), and if I did he had made some intimation to me about it before." (See Record, pp. 206–'7.)

Who doubts that Turpin did remind him? Who doubts that it was a part of Turpin's daily thoughts, and that Ralston was not allowed to forget? How else can it be explained that Turpin from young Ralston's childhood clung to him with the tenacity of the leech until, like the leech, he was filled to satiety? Until the deed of the 19th of April, 1881, was executed Turpin stuck "closer than a brother," alternately chiding and fawning, but never falling out. After the deed was signed—after his hopes had ripened into fruition—whilst he still continued to manage Ralston's business and draw his commissions, his visits to Ralston were, like those of the angels, "few and far between." The poor fellow languished on the bed from which he was to be borne to the grave and longed for the presence and sympathy of the friend whom he had trusted and loved, but he looked and longed in vain. Turpin was written for and warned that the end was nigh. He was told that if friendship was not strong enough to draw him to the bedside of his dying benefactor that he should come at once and settle the business (see Mrs. Ralston's evidence, Record, p. 98), but Turpin tarried until that dread visitor from the unseen world had closed the eyes which he of all others should have closed for their final sleep. If Turpin did not keep young Ralston constantly reminded of the will, and that his mother had promised that he should make it, how shall we account for that sudden and speedy visit to Stamford to procure the deed just as soon as Turpin "received reliable information that Ralston was married?" (See Turpin's evidence, Record, pp. 208 and 214.) Who first

reminded Ralston that the marriage had rendered the will invalid? We are authorized to infer from Turpin's testimony that the first thing he thought of, when at Saratoga he received reliable information of Ralston's marriage, was the effect of the marriage on the will, in which Turpin's family were so deeply interested. He immediately starts off to New York. His partner, Mr. Ogden, and the lawyer (Mr. Proudfit), who had drawn one of the wills, are conveniently on hand. Is it not a little remarkable that these *three* should *all* have happened to be in New York at the same moment, just at this time? Turpin does not even wait to see Ralston and ask him if he will have a deed prepared or make another will. So confident is he of his power, with Ogden's presence and aid, that he directs Proudfit to prepare—not another will such as he had drawn and Ralston had signed before, but an *irrevocable* deed (as he then supposed) and then he and Ogden hastened to Stamford. Ralston and his wife, knowing Turpin's hostility to their marriage, had in very fear concealed it from him. What must have been their anxiety and trepidation when, returning from their ride, they found him at their house! When they meet him and see that instead of an angry frown, his face is illumined with smiles, no wonder that their hearts leaped with joy, and that they (as he says) were glad to see him and treated him well (see Record, p. 208). Mrs. Ralston at once implores him not to speak of her former life and thus break up her social relations with the best people of Stamford (see Record, p. 208), and young Ralston, remembering his promise not to marry Ida Blanchard, is anxious to conciliate and gratify his friend and former guardian. Both deprecated his wrath, little dreaming that he was as anxious to conciliate as they, and that his chief object in coming was not to visit or reprove them, but to get the property secured to his children against any future contingency. He, at once seeing his advantage, that they were both in a mood for anything he might propose if he would only promise not to persecute or expose

them to the good people of Stamford, boldly, but in the best of humor, produces his deed and reads it to them, telling them that the marriage had destroyed the validity of the will (see Record, page 209), and that if they had no objection he would like for them to sign the deed. They were so completely under his dominion and power they did not even ask him why he would not be satisfied with another will. It is not pretended that Mrs. Bozeman had ever told Turpin that "Jimmie" would make him an *irrevocable* deed, nor that "Jimmie" had ever before proposed or hinted such a thing. No lawyer or friend is called in. Turpin, in secret conference with them, arranges the whole thing, and they, deprecating his displeasure and exposure, gladly escape from these by doing as he bids them. It is at least questionable whether either of them knew the difference, in legal effect, between the deed and the will; but no matter—the thing must be done. Ogden, brought for the purpose if necessary, is conveniently near and is seen or sent for. Ralston and wife are placed under his charge and the search for a commissioner is begun. Why were Ogden's services called into requisition? it may be asked. Was Ralston too deficient in mind to go to Bridgeport and inquire for a commissioner and execute the deed before him, or was it necessary to have Ralston and wife under surveillance all the time until the deed was signed? When they returned Turpin took charge of them, nor did he lose sight of them until the deed was duly executed in the city of New York. Whilst Ogden did not accompany them to New York, he preceded them, after making an appointment to meet Turpin at the office of the commissioner where the deed was to be signed and witnessed—doubtless to be conveniently near if needed. Turpin does not remember whether he paid the expenses of Ralston and wife or not to Bridgeport and New York, but he does remember that he paid the commissioner's fee for attesting the deed, and Proudfit swears that he paid his fee for preparing it. (See

Record, pp. 214 and 132.) Was this—and we have given Turpin's account of it—an act prompted by the free and unsolicited volition of Ralston and wife? There is no case on record in which the influence of the grantee was more apparent. All the evidence introduced by the respondent shows this influence. The fact that will after will was made, and deed after deed, shows it. First there is the will of 1874; then the will of December, 1879; then the deed of August 26th, 1880; then the deed of August 28th, 1880, and finally the deed of April 19th, 1881. In the case of Bridgeman *vs.* Green, 2d Vesey, 627, there was much evidence to the effect that the grantor was perfectly aware of what he was doing and had repeatedly confirmed it; whereupon Chief Justice Wilmot pertinently observed that such facts "only tend to show more clearly the deep-rooted influence obtained over him," and adds: "In cases of forgery instructions under the hand of the person whose deed or will is supposed to be forged, to the same effect as the deed or will, are very material; but in cases of undue influence and imposition they prove nothing, for the same power which produces one produces the other, and, therefore, instead of removing such an imputation, it is rather an additional evidence of it." (Vol. 2, Part 2, Leading Cases in Equity, mar. p. 417.)

Moreover, almost every witness sworn by respondents testifies to the confidential relations existing between young Ralston and Turpin and the great influence which the latter had over the former. Turpin had been the confidential business agent of James A. Ralston, Sr. (the father of young Ralston), the sole executor of the will of Mrs. Bozeman (the mother of young Ralston), the special agent of Thornton (the administrator of the estate of James A. Ralston, Sr.), the selected guardian of young Ralston himself until he attained his majority, and then the confidential business agent of young Ralston from that time until the latter's death, having the entire control and management of his large property. Turpin himself testifies that, although Tur-

pin & Ogden were the agents of young Ralston to rent out and manage his property, he (Turpin) was specially looked to by Ralston to take care of his interests. Seldom, if ever, has there been such a combination of influences or such a multitude of relationships of a confidential nature.

Block, the book-keeper of Turpin & Ogden, testifies that young Ralston reposed almost implicit confidence in Turpin and was almost wholly under his influence. William H. Ross, who knew all the parties well, gives confirmatory testimony. Thomas L. Massenburg, who was also well acquainted with the parties and saw them whilst the said Ralston resided in Macon, Georgia, almost daily, and who was, moreover, appointed, with the said Turpin, as an executor of the last will of the said Ralston, testifies that Ralston's confidence in Turpin was almost unlimited and Turpin's influence over Ralston was very much like that of a father over a son. The testimony of Orr (another book-keeper of Turpin & Ogden), is to the effect that Turpin's influence over Ralston was almost unbounded. So is the evidence of Adams, of Herbert Brown, and of Hines.

These witnesses were all sworn by respondents and, in short, it may be stated that almost *all* the testimony touching the relations which existed between Ralston and Turpin shows the unbounded confidence of Ralston in Turpin and the almost unlimited influence of the latter over the former. Even those witnesses in New York and Connecticut who did not know Turpin testify to the frequent allusions of Ralston to Turpin as his best friend and the person who had obviously more influence over him than all others combined—as one in whom Ralston implicitly trusted and on whom he implicitly relied.

In addition to all this, the transaction itself furnishes inherent evidence of the wonderful and overpowering influence of Turpin over this young man, and over his wife also. How else shall we account for the fact that Ralston, within seven months after his marriage and before he could possi-

bly know whether there would be children of that marriage, executed a deed in favor of Turpin's children (in nowise related to him) for fully one-half of his estate? Here is a comparatively young man (32 years old, according to Turpin's testimony) who *gives away* to a stranger to his own blood one-half of his entire estate, and gives it away *irrevocably*, without waiting even a year to see what would be the fruit of his marriage, thus divesting himself, in large measure, of the means of providing for the children of his own loins, should his wife bear him such children, of which there was then every reasonably probability, in order to make provision for the children of one who was not related to him, either by blood or affinity. The influence which could bring about such results must in truth have been not only powerful, but irresistible.

Ralston had five aunts, three of whom had children. He not only sets them aside in favor of Turpin and his children, but he strips himself of the means of securing the comfort of the fruit of his own loins.

The case is hardly less strange when considered with reference to the influence exerted over Mrs. Ralston. Here was a young woman, just married, giving up all interest in one-half or more of her husband's estate in favor of the children not only of a stranger to her, but of one who had abused and persecuted her and sought to deprive her of her only remaining hope of rescue from a life of shame and sorrow.

What motive could she have had to make such a surrender of her rights to a stranger and a former enemy? What but fear could have induced it? She had cast off her old life of sin and degradation and was seeking to obliterate the past and to take a new position in a new community as the honored wife of the man whom she had trusted and loved. To prevent exposure and the utter destruction of her new hopes and aspirations she was ready to yield anything, even the half of her husband's estate. Can it be said that her consent under such circumstances was freely and voluntarily given?

Another fact in this case testified to by Turpin demonstrates not only the irresistible influence of Turpin over Ralston, but shows with equal clearness that Ralston (as alleged in the amended bill) did not know whether the instruments he executed were wills or deeds. Within a day or two after the deed of August 26th, 1880, was made and signed, Proudfit (Turpin's lawyer) discovered an informality in it and Ralston is called on to execute another. It does not appear that he was informed what the informality was nor that he inquired. He did not know the legal effect of what he had done and did not ask. He did, without hesitation, what satisfied Turpin. This is still more clearly demonstrated by the circumstances attending the execution of the last deed, the one dated April 19th, 1881. Major Bacon (Turpin's lawyer) discovers that both of the previous deeds are of a testamentary character or at least is doubtful about it. Without he or Turpin consulting Ralston, Major Bacon prepares another instrument—not testamentary in its character, but a deed of gift, conveying a present interest—and Turpin transmits it by mail to Ralston, accompanied by a letter which simply informs Ralston, as before, in the case of the deed of August 26th, 1880, that there was an *informality* in the former deed or paper, and asks Ralston to sign it. The letter did not inform Ralston that the former paper was *invalid* (as we claim was the fact) because, being testamentary in its nature, it should have been executed in the presence of three witnesses, but merely that there was some *informality* in it! A paper having *no legal validity* is referred to as having some trifling informality about it! Again, Ralston does not inquire even what the informality consists in. Shall this be attributed to his then imbecility, as testified to by Drs. Wylie and Hurlburt and the other New York and Connecticut witnesses, or to that blind confidence in Turpin which *all* the evidence shows held Ralston in such complete subservience to the will and wish of the former?

Is it possible for testimony to show more conclusively and clearly the ignorance, imbecility, trust, and confidence of a grantor and the selfish designs and overwhelming power and influence of a grantee? If further proof is wanting as to the latter, it is furnished in the evidence of Palmer (not disputed by Turpin) of Turpin's exulting declaration that "he had the deeds all safe, and that he (Ralston) might tear up his wills," or words to that effect. (See Record, p. 188.)

Indeed this undisputed testimony of Palmer discloses unmistakably the motive which induced Turpin to cling to Ralston so tenaciously and to *pose* as his truest and best friend. It discloses, moreover, Turpin's object in getting Ralston to make an *irrevocable* deed instead of another will.

The excuse set up by respondents for Turpin's conduct in this matter is that Ralston had frequently expressed an intention to give Turpin or his family an interest in his estate after his death and had executed two wills giving effect to this intention.

Supposing that these declarations and acts of Ralston were uninfluenced by Turpin (which is not at all clear under the evidence), they did not justify Turpin's active efforts to obtain an irrevocable deed nor his conduct in obtaining it.

1st. These declarations and acts of Ralston were *all* made and done *prior* to his marriage. If Ralston still intended to provide for Turpin or his family after his marriage Turpin should have allowed Ralston of his own voluntary act and without suggestion or solicitation to have moved in the matter.

2d. The evidence nowhere shows that Ralston ever did voluntarily suggest or propose to make Turpin or his children an irrevocable deed. The first suggestion of this sort came from Turpin, and the evidence clearly shows that Turpin had a motive in preparing and proposing such a deed, which was not disclosed to Ralston, to wit, to put the

matter in a shape where it would be beyond Ralston's control—where, if he changed his mind, he was powerless to change what he had done.

3d. Between persons occupying such relations as existed between Turpin and Ralston the law will not tolerate the exercise of the least influence in order to obtain a gift or gratuity, especially if the person from whom the gift is sought is of doubtful legal capacity to make it and is greatly under the influence of the person seeking it. Still less will it tolerate *active* preparation and *maneuvering* to bring it about. *Every step* which a grantor takes in such a transaction must be the result of his own unaided suggestion and volition. The fact that he has expressed an intention to provide for one occupying close confidential relations to him or has done acts in execution of such intention will not justify active efforts by the grantee to induce the grantor to make such provision, and especially to put it in an *irrevocable* shape, and still more especially where the circumstances existing when the declarations or acts of the grantor were made or done are altogether different from those existing when the irrevocable provision is sought.

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Counsel for Appellants.

RECEIVED
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JAMES H. MCKENNEY,

IN THE SUPREME COURT OF THE UNITED STATES.

No. 98.

OCTOBER TERM, 1888.

Ida Ralston vs. Geo. B. Turpin, Trustee, et al.

Appeal from the Fifth Circuit Court of the United States, Southern District of Georgia, Western Division.

BRIEF OF

AUGUSTUS O. BACON AND JOHN C. RUTHERFORD,

Solicitors for Appellees.

In the Supreme Court of the United States.

Ida Ralston vs. Geo. B. Turpin, Trustee, et al.

Appeal from Fifth Circuit Court of the United States, Southern District of Georgia, Western Division.

BRIEF OF

AUGUSTUS O. BACON AND JOHN C. RUTHERFORD,

Solicitors for Appellees.

ABSTRACT OF THE PLEADINGS.

On the 26th day of August, 1880, James A. Ralston, thirty-two years of age, formerly of the State of Georgia, but then living in Stamford, Connecticut, made a deed of gift conveying to George B. Turpin, of Macon, Georgia, as trustee for all his (Turpin's) children, excepting one who was excluded, certain real estate in the City of Macon, Georgia, estimated to be of the value of between forty and fifty thousand dollars.

To correct an alleged defect in this deed, another was executed by Ralston to Turpin, trustee, August 28th, 1880, conveying to him the same property. To still further correct an alleged defect in each of the foregoing deeds, Ralston, on the 19th day of April, 1881, executed a third deed, again conveying to Turpin, as trustee, the same property described in the foregoing deeds.

In each of these three deeds Ralston reserved to himself during his life the possession of said property, and all rents, issues and profits of the same. Each of said deeds was executed before a Commissioner of Deeds for Georgia, in the City of New York. At the

execution of each of said deeds, Ida Ralston, the wife of said James A. Ralston, was present; and at the time of its execution gave in writing, under her hand and seal, her consent, and ratified and confirmed the same.

Jas. A. Ralston died on the fourth day of July 1883.

On the seventh day of August, 1883, the said Ida Ralston filed her bill in the Fifth Circuit Court of the United States for Western Division of the Southern District of Georgia, against the said George B. Turpin, as trustee, and against such of his children as were named as beneficiaries in the three several deeds. In said original bill (see transcript page 1) and in three amendments to the same (see transcript pages 22, 47 and 49) subsequently filed, the complainant prayed that said defendants be required to deliver up said deeds to be cancelled, and be decreed to deliver and to pay her the rents, etc., which had accrued on said property, etc.

The allegations in said bill and the said amendments were substantially as follows:

That in 1864, James A. Ralston, Senior, the father of the James A. Ralston above mentioned died, leaving an estate worth more than two hundred thousand dollars of which the latter as the sole surviving child and his mother Mrs. Aurelia L. Ralston, became possessed in equal parts. That in 1867, Mrs. Aurelia L. Ralston intermarried with Dr. Nathan Bozeman, of New York, and in 1873, she died, leaving by will to her son said James A. Ralston, a considerable portion of her estate. Of this will said George B. Turpin was named as executor with two others, but said Turpin alone qualified and became sole executor. Turpin was in 1867, appointed guardian of James A. Ralston, then a minor, and continued to act as such until Ralston reached his majority having during all the time of such guardianship the management of his ward's property.

It is further alleged that before he became guardian Turpin had become "intimately friendly with Ralston, and soon thereafter, acquired considerable influence" over him. That Turpin shortly thereafter ingratiated himself in the favor of both Ralston and his mother, and by the confidential relations thus established, strengthened his influence with the former and easily influenced him as to management and disposition of his property. That when Ralston became of age, Turpin still continued to manage his property as his "business agent and trusted friend," maintaining the same confiden-

tial relations as formerly. That Turpin and Ogden (a firm of which Turpin was a member) up to the time of Ralston's death had the management of his property, renting out the same, collecting the rents for commissions, etc. That Ralston for many years prior to his death lead an extravagant and dissipated life, giving little or no attention to his business and trusting the same entirely to the management of Turpin & Ogden. That Turpin had a peculiar influence over him owing to his constant protestation of friendly interest in him, and his devotion to his interest.

It is further alleged that Turpin taking advantage of such influence went to Stamford, Connecticut, and procured Ralston to sign the first mentioned deed, stating to him in complainants presence that he had often promised to do something for his Turpin's children after his, Ralston's death. That Turpin brought with him a deed already prepared. That Ralston being in weak and declining health and ready to do anything Turpin would ask, readily consented to sign the deed, and that complainant being also herself then greatly under the influence of Turpin, and also unwilling to oppose her husband consented to unite in making the deed. Two days after said deed was signed, Turpin being for some reason dissatisfied with it had another deed prepared and "insisted" that complainant and her husband should sign the same and they being still under his influence did as they were bidden by him.

In 1881, Turpin forwarded by mail from Macon, Georgia, to Ralston, who was then in New York, another deed to same property. Having executed the former deeds, both complainant and Ralston executed this almost as a matter of course regarding it merely as a correction of some informality. It is also alleged that Turpin at the time of forwarding this third deed for execution knew that Mrs. Smith, Ralston's Aunt, was then in Macon, to commence legal proceedings against Ralston for a large amount, and that Turpin concealed this fact from Ralston.

Neither of the deeds of gift was based on any valuable consideration. Turpin had been fully compensated for all services rendered in the management of Ralston's property. If deed allowed to stand there will be little left for complainant.

Turpin as executor (named in last will as such with Thomas L. Massenburg) is entitled to qualify and is not a proper person to conduct this litigation against himself as trustee.

In the first amendment (see transcript page 22) filed by complain-

ant May 6th, 1884, nine months after the filing of the original bill it was alleged as follows in substance:

That said Ralston by reason of the excessive use of intoxicating liquors had become so weakened in mind and body that at the time of the execution of said deeds he was incapable of attending to any business and did not attend to any, and was then incapable of comprehending and did not comprehend the nature and importance of the transaction; and that by reason of his said condition he yielded to the influence and persuasions of Turpin.

Complainant further alleged in this amendment that when she signed her consent to the deeds she also acted under the influence of Turpin, and was afraid he would work separation between herself and her husband if she offended him. She also realized that he had charge of all of her husband's business, and they were both dependent on his favor. Besides she did not then know that that property embraced the most valuable part of her husband's remaining property. Turpin representing the contrary to be true. "She and her husband were both overreached and deceived by said Turpin, and yielded because they were in effect powerless to resist."

In the second amendment (see transcript page 47) filed by the complainant May, 29th, 1885, nearly two years after the date of the original bill, and after the trial of said cause had been commenced in the circuit court, it was alleged as follows in substance:

That at the time of the execution of the first deed, August 26th, 1880, when she and her husband both executed the same, neither he nor she knew whether the same was a will or deed, or what its true legal effect was. That "they were then both so under the influence of Turpin, and so anxious to conciliate and gratify him that they did not stop to consider the character or effect of the paper they were asked to execute, and neither of them had any opportunity of taking the advice of any friend or person learned in the law." Two days after the execution of this deed, Turpin insisted that she and her husband should execute the second deed, and they "being still under the same influence did as bidden by the said Turpin."

In the third amendment (see transcript page 49) filed June 12th, 1885, after the hearing of said cause had been commenced in the Circuit Court, it was alleged as follows in substance:

That since the bringing of this suit the paper purporting to be the last will and testament of her late husband, deceased, which was in her possession at the time of his death, was offered for probate by

her in the Surrogates Court in New York City, that a caveat was filed to the probate of said will and that the same had been adjudged by said Court to be not a valid will. That she has no control over said paper, the original having been filed in the said Surrogates Court, etc. That upon the filing of said caveat her counsel had advised her she had no interest in setting up said instrument as a will as she was sole heir at law.

To the foregoing bill the defendant filed a demurrer, (see transcript, page 18) which was withdrawn, after the first amendment was filed, and before argument. (See transcript, page 21.)

After the withdrawal of the demurrer, George B. Turpin, as trustee, filed his answer which was in substance as follows:

The allegations as to the will of said Ralston—that is, as to its contents—respondent believes to be true. The complainant has the will in her possession, and refuses to surrender it either to respondent or to the Court of Ordinary of Bibb county, State of Georgia, for probate, although respondent is appointed in said will as one of the executors, and demand for said will has been made upon said complainant in order that it might be duly probated.

Respondent shows that during the lifetime of James A. Ralston, Senior, the father of complainant's husband, he attended to a large part of his business, and in addition to his close business relation respondent possessed the friendship and confidence of the said James A. Ralston, Sr., up to the time of his death. After the death of the said James A. Ralston, Sr., the legal representative of his estate, Mr. Thornton, appointed respondent under a power of attorney, to attend to all the business of said estate, such as collecting rents, renting out the property, and keeping the same in repair. The bulk of the property of said estate consisted of real estate in the city of Macon, all of which duties respondent discharged to the satisfaction of all concerned. In 1867, James A. Ralston, Junior, the husband of complainant, being then a full grown man in everything except age, being about nineteen years of age, on his own motion and without any solicitation on the part of respondent, selected respondent as his guardian, and who was duly appointed as such by the Ordinary of Bibb county, on the second day of August, 1867.

Respondent managed the property of the said James A. Ralston, Jr., from the time of his appointment as guardian until the said

Ralston became of age, in 1869, when respondent had a full, complete and formal settlement with the said Ralston, turning over to him his entire property and accounting for all of its rents, issue, and profits, the said Ralston being well pleased with the care, protection and management of his property by respondent. On the 3d day of May, 1869, respondent received his letters of dismission from said guardianship from the Court of Ordinary of Bibb county.

After respondent was discharged from said guardianship, the firm of Turpin & Ogden, real estate agents in the City of Macon, of which firm respondent was a member, was employed by the said James A. Ralston, Jr., to rent out and collect the rents for his real estate situated in the City of Macon, which they continued to do up to the time of said Ralston's death.

It is true that during all of this time the said James A. Ralston, Jr., by reason of the friendly relation which had always existed between the said Ralston, his family, and this respondent, relied upon respondent as the particular member of the firm of Turpin & Ogden to look after this property, to preserve it and collect the rents. The provision made by James A. Ralston for himself and children was freely and voluntarily made, without any persuasion or solicitation on the part of respondent, not even a suggestion or intimation to this effect was ever made at any time or in any way to the said Ralston by this respondent. The intention to make said provision existed long before the said Ralston even intimated same to respondent, for he shows that when Mrs. Aurelia L. Bozeman, the mother of the said James A., made her will she stated to respondent the friendship she and her family entertained for him and the confidence they had in him and the appreciation and regard they had for the manner in which respondent had ever acted towards the family, and then said the reason why she had not made any provision for him in her will was because her son, the said James A., either had or would make provision for respondent in his will. Respondent never mentioned to the said James A. what his mother had told him, and some years after this, without the least intimation, suggestion, persuasion or solicitation, the said James A. made his will, to wit, on the 11 day of May, 1874, in which he directed his property to be divided into two equal parts, and willed one-half of the same to respondent, as trustee for his aunt, Mrs. Laura R. Smith, and her children, and the other half to respondent, in trust for himself and children. Some years after this will was made, the said James A., of his own free will and

without the least suggestion from respondent, made another will on the 15th of December, 1879, in which will the same property described in the deeds attached to complainants bill was bequeathed to respondent in trust for certain children of respondent, being the same children mentioned in said deeds. The will of 1874 included all of respondent's children born and to be born.

One of respondent's children had displeased the said James A., and hence, in the will of 1879, as well as in said deeds, this child was omitted. If respondent had ever been consulted in the matter he certainly would have expressed a desire that all his children should share equally in the bounty of the said James A., for the one omitted was as dear to the respondent as any of the others. James A. Ralston, like most young men who have plenty of money and no business occupation, and of a noble and generous disposition, was at a very early age disposed to be wild, and as was usual and customary, frequently joined other young men in a social glass. Respondent did, by reason of his friendship for his family and for the said James A. himself, exert all the influence he had to prevent him from running into excesses of all kinds, but did not have sufficient influence to protect him against evil habits and evil associates. Years before the marriage of the said James A. Ralston with the said complainant, she, the said complainant, was an inmate of a lewd house in the City of Macon, and had obtained in some way a most wonderful and mysterious influence over the said James A., leading him into the most extravagant excesses and dissipation, which, on coming to the ears of his friends, caused much disagreeable talk, and reflected considerably upon the character of said James A.

Respondent admits that he did exert all the influence he had with the said James A. to induce him to break off all connection with the said complainant, for, being at the time an inmate in a lewd house, respondent did not regard her as a fit associate for the said James A., and her influence over him was for evil and not for his good; and all the relations and friends of the said James A. entertained the same opinion as respondent, and were also earnestly solicitous that all connection between the two should be broken off.

The influence of the said complainant over the said James A. was much greater than his, for she finally persuaded him to go with her to the State of New York, and then by the exercise of undue and improper influence persuaded the said James A. to marry her. Neither respondent nor any of the relatives or friends of the said James A.

had any positive knowledge of it until some time in August, 1880, when he received what he regarded as reliable information that the complainant had really married the said James A., whereupon respondent went immediately to where the said James A. and complainant were then living in Stamford, Conn., to see himself if it could be true and what could be done about it, still cherishing the hope that there might possibly be some mistake or that the marriage was not legal and binding. Upon arriving at the house where they were staying both James A. and the said complainant informed him that they were married legally. Respondent did not upbraid or reproach either of the parties. Complainant then informed this respondent that she was associating with some of the best and most respectable people of the town, who knew nothing of her former life, and asked respondent to keep secret her former life. Respondent assured her he would certainly do so, and that, since they were married, he would do whatever he could to add to their happiness. While at the house of the said James A., and in the presence of the said complainant, respondent remarked to the said James A. that his marriage revoked the will he had made, which bequeathed certain property to respondent's children, and that, as he had for some time past expressed a desire that his children should have this property, asked whether he still desired they should have it; whereupon the said James A. unhesitatingly replied that it was his desire and had been for some time that his children should have this property. Respondent then asked if he was willing to make a deed conveying the present title, but reserving the use of the property to himself until his death. He, the said James A., at once, without hesitation, replied that he would do so with pleasure. The complainant readily assented and expressed herself perfectly willing to sign the deed. There was no persuasion of any kind or in any shape, and this was the first time that respondent had ever spoken to the said James A., as to his intention to give this property to his children.

Mr. Ogden was at that time on a visit to relatives in the same town, and it was suggested that the said James A. and complainant should go with Mr. Ogden to Bridgeport, where it was thought a commissioner of deeds for Georgia could be found, and have said deed executed. Whereupon the parties went to Bridgeport, but finding no Commissioner the deed was not executed. As respondent intended to return to New York, both the said James A. and the complainant voluntarily and cheerfully agreed and proposed to accompany respon-

dent as far as New York, which they did, and signed the deed to the same property bequeathed in the will of 1879, and to the same children of respondent. This deed was signed freely and voluntarily, both by the said James A. and the complainant, without any persuasion whatever. It was ascertained that there was some informality in the deed; whereupon another was drafted, and the said James A., and the said complainant freely and voluntarily signed this second deed on the 28th of August, 1880.

Some time after this, while in Macon, respondent's attorneys, on their own motion, suggested that this second deed was not drawn properly. Respondent then requested them to draw a deed to the same property, which they did, which deed respondent sent to the said James A. while he was still at the North, which deed was properly signed and executed both by the said James A. and the complainant. Respondent certainly did not use any persuasion to induce either of said parties to sign said deed, for when the same was executed respondent was in Macon, Georgia, and the said parties in New York City.

The deed, after being signed, was returned to respondent through the mail by the said James A. From this time on, up to the death of the said James A., in 1883, respondent never heard of the slightest dissatisfaction as to the signing of said deeds.

Respondent denies that at any time he made any comparison as to the value of the property deeded to his children with the remaining property, either to the said James A. Ralston or to the complainant. The said James A. was as well acquainted with his own property as this respondent was. The allegation in the complainant's bill that he exercised an undue influence over her cannot possibly be true, for when he first met complainant after her marriage he assured her, by reason of his kind feelings and friendship for the said James A. he would do anything he could do to add to their happiness. In a short time after said marriage the complainant began to complain that the said James A. had treated her cruelly, and threatened to leave him. The said James A. complained upon his part that the said complainant had treated him in a most shameful and heartless manner, beating him and otherwise mistreating him. Respondent advised the said complainant to deal kindly with the said James, and instead of doing or saying anything to separate them, recognizing that their marriage was valid and legal, he did all in his power to reconcile them to each other, and counseled the said complainant to be patient

and forgiving. While respondent would have done, for the sake of the family and for his friendship for the said James A., all that he could to prevent the marriage, yet, after they became man and wife, he felt he had no authority or right to interfere. These quarrels between the said James A. and complainant were frequent and continuous, and of a most violent character. The said James A. would at times telegraph to respondent not to send any more money to his wife, and would speak of her to respondant in language of the strongest abuse, and this was even done in the presence of complainant while she was narrating the wrongs she had suffered. Therefore respondent says that complainant had no fears that he would attempt to separate her husband, for she knew the efforts respondent had made to induce them to live peacefully together, and that he had advised her against separation at a time when she threatened to do so.

The mother of the said James A. appointed him her executor of her last will and testament together with her husband, Dr. Bozeman, and Dr. Bozeman permitted this respondent to qualify as sole executor and to manage and wind up the whole estate. The Ordinary of Bibb county allowed this respondent as such executor, the sum of five thousand dollars as his commissions for turning over the estate to the legatees under said will, and while Dr. Bozeman paid $2,000.00 as his part of said sum to respondent, yet he did not collect a cent of it from James A. Ralston, the other legatee. While the said James A. had a large income, yet, by reason of the evil influence he was under, he spent large sums of money, frequently beyond his income, and then would call upon respondent to advance him money, which respondent did. While Turpin & Ogden, as real estate agents in Macon, collected the rents and attended to the renting out of the property of the said James A., situated in Macon, they charged him less commission than they did some other parties for whom they performed like services. The property willed and deeded to his children was encumbered by a lien of five thousand dollars. Ralston of his own accord paid twenty-five hundred dollars of this money on the said five thousand dollar lein. He died leaving said property encumbered by a lien of twenty-five hundred dollars, besides the accumulated interest.

As to the settlement made with Mrs. Laura R. Smith, respondent shows that Mrs. Smith was a sister of James A. Ralston, Senior, the father of James A. Ralston, Junior, and from whom he inherited all of his property. The said said James A. Ralston, Senior, had the

settlement and winding up of his father's estate, and Mrs. Smith claimed that he had never settled with her, and that most of the property which had descended to James A. Ralson, Junior, and his mother was the identical property which had been owned by the father of Mrs. Smith and James A. Ralston, Senior. The claim was upon the property then owned by James A. Ralston, Jr., and Dr. Bozeman; James A. Ralston, Jr., constituted respondent his agent to bring about a settlement of the matter amicably if it could be done; if not, to have it litigated in the Courts. Respondent after examining the papers of James A. Ralston, Senior, together with Dr. Bozeman, became satisfied it was best to settle with Mrs. Smith, but would not act upon his own judgment, but after consulting with Dr. Bozeman, one of the parties interested, and with Col. H. J. Lamar, a man of excellent judgment and great business experience, both of these gentlemen advised a settlement by all means; therefore respondent thought that if Dr. Bozeman, a man of large experience himself, and one of the first physicians of the City of New York, and one of the parties interested, and one who had to pay his part of the settlement, was not only willing but anxious for a settlement, that it was the best thing that could be done under the circumstances for the interest of the said Jas. A., especially as respondent had come to the conclusion after examining the papers of the said James A. Ralston, Senior.

Both wills already alluded to, as well as the first two deeds made, were signed long before Mrs. Smith had set up her claim, and the last deed was written and forwarded to New York before she disclosed the nature of her demand. Respondent was not controlled or influenced by anything he did, in any manner, shape or form, by anything Mrs. Smith said or did, but the settlement was made conscientiously, and as he believes for the best interest of the said James A. In this matter he never did anything without first consulting the said James A. Ralston, and never agreed to the terms of the settlement until he first submitted the same to the said James A., and both complainant and said James A. consented to and agreed to the said settlement and signed the same.

While it is true that James A. Ralston, did at times drink to excess and while under the influence of liquors, was in the same condition of every other man similarly situated, yet when sober or only drinking moderately, he was in the full possession of all his faculties and as rational as any man.

At the time the said James A. Ralston signed the first two deeds

he was perfectly sober and perfectly rational and was accompanied by the complainant on both occasions, who joined in the deeds with the said James A. The last deed was signed by the said James A. and complainant in New York City, while respondent was in the City of Macon, and, while respondent was not present at the time, he is informed and believes that the said James A. was perfectly rational at the time of signing the same. The said James A. afterwards, when sober, referred to said deed and recognized the same. Some years after the said wills had been made and after all three of said deeds were made to respondent, as trustee, the said James A. made to complainant a deed to two valuable stores in the City of Macon, the rents of which she received in her own right and name up to the death of the said James A., and since.

The said will spoken of in said bill was made by James A. Ralston long after the two wills, which made respondent's children legatees, as well as after the three deeds which left them certain property in the City of Macon. Under this will the complainant claims the whole of the estate left by said James A. to wit: In addition to the two brick stores deeded her in his life, two other valuable stores, as well as another store and warehouse, all situated in the City of Macon, and his interest in the plantation in Southwest Georgia, and two lots of land in Cherokee.

To the original bill and several amendments of the complainant, including the amendments filed during the trial of the cause in the Circuit Court, the defendant filed his answer substantially as follows:

The complainant as well as James A. Ralston, Jr., knew that the deed of the 26th of August, 1880, as well as the deeds of the 28th, August, 1880, and April 19th 1881, were intended by all the parties to said instruments to be deeds, and it was fully understood that each of them were deeds at the time they were executed; and the deeds of the 26th August, 1880, and the 28th of August, 1880, although containing several informalities, are valid deeds under the law, the intention of the parties to said instruments being plainly expressed that they would operate as such.

The statement made by complainant that neither she nor James A. Ralston knew whether the deed of August 26th, 1880, was a deed or a will, was not made in her original bill, and is an after-thought suggested during the progress of the cause.

The allegation that neither complainant nor James A. Ralston had

any opportunity of advising with any friend or person learned in the law before signing said deeds, is not true, for complainant and James A. Ralston voluntarily came from Stamford, Conn., to New York City, unaccompanied by any one, for the purpose of signing the deed of August 28th, 1880; they stopped at their own hotel. Respondent did not even know when they arrived in New York City. There certainly was every opportunity of consulting a lawyer, both in the town in which they lived as well as in New York City. This allegation is all an after-thought suggested to complainant's mind after hearing the legal points of her case discussed; for after he had fully explained to James A. Ralston that his marriage revoked the wills he had made, which explanation was in the presence of complainant, and had said to James A. Ralston that if it was still his desire that respondent's children should have the property mentioned in the will, and if it was perfectly agreeable both to him and the complainant, that he had a deed drawn giving this property to this respondent's children at the death of him, the said Ralston, but reserving the use of rents of said property as long as he, the said Ralston, should live, the said Ralston said it was his desire that respondent's children should have the property mentioned in the will, and both he and complainant said it would give them pleasure to sign the deed.

It could not have been explained more clearly what the deed contained and its practical effect than it was explained by respondent, nor was there the slighest misunderstanding on the part of any one. Mr. Ogden, who had been invited by James A. Ralston to pay him a visit that Summer, had come to Stamford with respondent for the purpose of visiting his relatives, residing then at a hotel, and the said James A. Ralston, of his own accord, called on Mr. Ogden at the hotel and brought him to his house to dinner, and as Mr. Ogden could remain but a short time in Stamford, James A. Ralston, of his own accord and upon his own suggestion, invited Mr. Ogden to accompany him and the complainant on their trip to Bridgeport, where they voluntarily went to find a Commissioner of Deeds for Georgia. Therefore there was every opportunity for either of them while in Stamford, at their own home, amongst their own acquaintances, or at Bridgeport, to have consulted a person learned in the law had they the slightest disposition to do so.

Respondent admits that the last will and testament of the said Jas. A. Ralston is now impounded in the office of the Surrogate of the

County of New York, and that the said will is not under the control of complainant, and that she cannot produce said will in Court.

Respondent objects to so much of said amendment as refers to the action of the Surrogate Court of New York, and asks that he will not be required to answer this part of the amendment, because respondent was no party to any proceedings that have taken place in said Court; and second, because respondent charges the whole proceedings to be one of collusion; the complainant voluntarily carried said will into that Court and colluded with one Mrs. Smith, who had no interest under the will and no interest if the will should be set aside, to caveat said will, and after causing the caveat to be filed, did not appear in Court to resist the same.

JUDGMENT OF THE COURT.

The Court on the issues raised by the pleadings and under the evidence produced on the hearing rendered the following decision:

First. Not only does the complainant fail to show such weakness of mind on the part of Ralston as will invalidate the deeds, but the evidence demonstrates that at the time they were made he was abundantly capable to dispose of his property as he might think proper.

Second. So far from indicating an abuse of influence or a betrayal of trust, the evidence amply shows that the disposition of the particular property had been the long settled and cherished purpose of Ralston's life, and it must stand as he intended. (Page 306.)

ABSTRACT

Of so much of the Wills, Deeds, &c., executed by Ralston as is required to show the dates of the same, the persons in whose favor made, and the property devised and conveyed.

First. Will of Jas. A. Ralston, dated May 11, 1874, (see transcript, page 228,) made in Macon, Ga., gave one half of his property to George B. Turpin in trust for his (Ralston's) aunt, Mrs. Laura R. Smith, and her children; the other equal part, (one half) of his property was given by this will to George B. Turpin in trust for himself and his children born and to be born.

In this will occurs the following: "And I request that my friend George B. Turpin, and his children after him, will see to it that my monument and grave shall always during their lives be suitably kept and cared for."

Second. Will of James A. Ralston, dated December 15th, 1879 (see Transcript, page 230,) gave—

1st. To George B. Turpin, trustee for certain of his children named, the Ralston Hall building and three adjoining stores, specified by number. (One of Turpin's children was excluded from the benefits of this bequest.)

2d. To Ida Blanchard, (afterwards Ida Ralston) four stores specified and all of his watches and jewelry.

3d. To his aunt, Mrs. Laura R. Smith, and her children, his one undivided half interest in the Ralston Mansion house in Macon, Ga.

4th. To his grandmother, Mrs. Mary Ann Lamar, all of his family pictures, during her life, and at her death to "my friend, George B. Turpin, of Macon, Ga., having enjoyed his friendship for a long course of years, I feel that they will be safe and kept intact in his hands."

5th. To J. Monroe Ogden his household furniture in the mansion house at Macon.

Third. The deed executed by James A. Ralston August 26th 1880, (See transcript page 33) conveyed to George B. Turpin, trustee for

certain of his children named, the same property which had been bequeathed to Turpin as trustee in the will of December 15th 1879. The same child of Turpin who was excluded from the benefits of the last named will was also excluded from the benefits of this deed. Ralston reserved during his life possession of the property and all rents, &c., of the same. His wife, Ida Ralston, was present at the execution of the deed, and under her hand and seal ratified and confirmed the same and consented to its execution.

Fourth. The deed executed by James A. Ralston, August 28th, 1880, (See transcript page 36) conveyed to George B. Turpin, trustee for certain of his children named, the same property which had been bequeathed to Turpin as trustee in the will of December 15th, 1879, and which was also conveyed to Turpin as trustee in the foregoing deed of August 26th, 1880. The same child of Turpin who was excluded from the benefits of the will of 1879, and of the deed of August 26th, 1880, was also excluded from the benefit of this deed of August 28th, 1880. As in the foregoing deed Ralston reserved to himself during his life the possession of the property and all rents, &c. of the same. His wife, Ida Ralston, was present at the execution of the deed, and under her hand and seal, ratified and confirmed the same, and consented to its execution.

Fifth. The deed executed by James A. Ralston, April 19th, 1881, (See transcript page 39) conveyed to George B. Turpin, trustee for certain of his children named, the same property which had been bequeathed to Turpin as trustee in the will of December 15th, 1879, and which was also conveyed to Turpin as trustee in both the foregoing deeds of August 26th, 1880, and August 28th, 1880. The same child of Turpin who was excluded from the benefits of the will of December 15th, 1879, and also from the benefits of both the deeds of August 26th, and August 28th, 1880, was also excluded from the benefits of this deed of April 19th, 1881. As in both the foregoing deeds Ralston reserved during his life the possession and all the rents, &c., of the property. His wife, Ida Ralston, was present at the execution of the deed, and under her hand and seal ratified and confirmed the deed and joined in the execution of the same.

[NOTE.—As a summary of the foregoing, attention is asked to the following facts shown by the same:

1st. In the will of December 15th, 1879, and also in each of the deeds of August 26th, 1880, August 28th, 1880, and April 19th, 1881, the identical property is in each instance given to Turpin, trustee for the same named beneficiaries, and in all four of these papers one particular child of Turpin is excluded from all participation in the benefits of the same.

2d. The property thus given in the will of 1879 and the three several deeds—August 26th and 28th, 1880, and April 19th, 1881—is shown by the evidence to have been in value about one-half of all the property (excluding the Mansion House) owned by Ralston at the time the will was made and the deed executed.

3d. The will of May 11th, 1874, specified no particular property bequeathed to Turpin, trustee, except that it should consist of one-half of the same. All of the children of Turpin, born and to be born, were specified as the beneficiaries, whereas as above stated, one particular child of Turpin was excluded from the will of December 15th, 1879, and also from each of the three deeds of August 26th and August 28th, 1880, and April 19th, 1881.]

Sixth—The agreement under hand and seal executed by Jas. A. Ralston, Nathan Bozeman, Mrs. Laura R. Smith and her children, June 28th, 1881, (see transcript, page 233), was for the settlement of a litigation. In it Jas. A. Ralston, on his part, undertook to pay ten thousand dollars to Mrs. Smith and her children, and as a portion of the same gave his promissory note for nine thousand dollars, and executed a mortgage on three stores in Macon to secure the same. (See article first of said agreement, transcript, page 234).

In the same agreement said Ralston undertook to execute and deliver to Mrs. Smith, for herself and children, a deed to two brick stores, reserving to himself the possession and enjoyment of the property until his death, and also reserving to his legal representatives the right to repurchase the said two stores, within a time limited, for the sum of ten thousand dollars. (See article third of said agreement, page 235). This last conveyance had nothing to do with the litigation, but was really a purchase by Jas. A. Ralston and his wife of a half remainder interest in the Ralston Mansion house, which remainder interest belonged to Mrs. Laura R. Smith, under the will of Jas. A. Ralston's mother. (See last clause

in article fourth of said agreement, near bottom of page 235 of the transcript).

Seventh. In the will made by James A. Ralston, October 21st, 1881, all of his property which he should have at the time of his death was bequeathed to his wife, Ida Ralston. In this will occurs the following:

Item 3d. "I nominate and appoint my friends, George B. Turpin and Thomas L. Massenburg, of the City of Macon, Georgia, as executors of this my last will and testament, of whom no bond be required at the time of the probate hereof, and the necessity of having my estate appraised, and inventory and returns made to the Probate Court, are hereby dispensed with, this the 21st day of October, 1881."

Eighth. The deed executed by James A. Ralston, January 30th, 1882, (see transcript, page 231), conveyed to his wife, Mrs. Ida Ralston, two stores, and constitute a portion of the property bequeathed to Ida Blanchard (afterward Mrs. Ida Ralston) in the will of December 15th, 1879.

Ralston's mental capacity to make the Deeds of Aug. 26th and 28th, 1880, and of April 19th, 1881.

The complainant's case rests upon two general grounds:

1st. That Ralston had not the necessary mental capacity to make the deeds to Turpin, trustee.

2d. That the deeds were not the voluntary act of Ralston, but were obtained by undue influence exercised over him by Turpin.

If the first position is well founded, it decides the case in favor of the complainant, and it will then be unnecessary to consider the second. We therefore invite the attention of the Court to a consideration of the evidence and the law applicable thereto upon the question of Ralston's mental capacity to make the deeds.

In the original bill filed by the complainant within about one month after Ralston's death, there is no charge that at the time of the execution of the several deeds, in 1880 and 1881, Ralston was incapacitated by mental weakness to make valid execution of the same.

Reference to the bill will show that it was not hastily drawn, but that it was prepared with careful and elaborate statement of all the allegations and grounds on which it was claimed that the deeds were invalid and should be cancelled. It gives no evidence either of the necessity or of the fact of hasty preparation, which might in some cases account for the omission of a most material and vital allegation which is afterwards supplied by amendment.

In the original bill the complainant's case, so far as it relates to the question of Ralston's voluntary act, is rested exclusively on the allegations that the deeds were procured by the solicitations of Turpin through the exercise of the undue influence which he possessed over Ralston, from the fact that he had been his guardian while a minor, and his business agent and confidential friend after he reached his majority. The only hint of anything more than this in the original bill is found in the allegation (See fourth page of the transcript) which speaks of Ralston "being in a declining state of health, his constitution being already greatly weakened by dissipation."

After the demurrer was filed to the bill, it was found necessary by the complainant to strengthen the allegations therein, and after the lapse of nine months from the date of the filing of the bill, an amend-

ment was filed in which it was alleged in substance (See transcript, page, 22) that Ralston, by reason of the excessive use of intoxicating liquors had become so weakened in mind and body that at the time of the execution of said deeds he was incapable of attending to any business, and did not attend to any, and was then "incapable of comprehending, and did not in fact comprehend, the nature and importance of the transaction."

As the issue raised by the foregoing allegation becomes the most important and controlling question of fact in the case, it is important while examining the evidence produced on the point, to bear in mind the significant fact thus disclosed by the record that it was not charged in the original bill, but appears as an after-thought keeping pace with the development of the necessities of the complainant's cause.

If the foregoing allegation is true, that at the time of the execution of the deeds in question, Ralston, by reason of mental incapacity, (by whatever caused produced,) was then "incapable of comprehending, and did not in fact comprehend" what he was doing, it must control the case against the defendants. We respectfully submit that the evidence in the case overwhelmingly proves the allegation to be untrue.

There is no dispute of the fact that Ralston was a dissipated man, and that he was frequently drunk.

It is at the same time shown by the evidence that he was not only frequently sober, but that he had long periods of sobriety. While he was drunk he was like all other drunken men, incapable mentally.

There is no pretence by any witness that he was drunk, or even drinking, at the time of the execution of either of the deeds; so that the question properly is, What does the testimony show was his mental condition when sober?

The first witness on this point, who appears at the instance of the complainant, is James H. Olmstead, an attorney at law residing at Stamford, Conn., who testified by depositions made in answer to written interrogatories. This witness testifies that he never saw Ralston but once in his life, and that was in February or March, 1881. His own testimony shows that at the time Ralston was in a condition of collapse after a drunken debauch. He describes him in this interview as "bursting into tears," "crying all the time like a child," "bursting into a flood of tears," &c., &c. He also represents him on this occasion as humble, obedient, and abjectly penitent, freely admitting every charge of vile conduct on his part made to his face

by this witness, and as unreservedly consenting to the witness' praise of the kindness and gentleness and purity and fidelity of Mrs. Ida Ralston in all her relations as a wife. He is shown to have been on that occasion not only submissive to the will of his wife and her attorney, but invites the latter to direct and dominate him, with the voluntary assurance that he will do whatever either of them directs, even to the surrender of all his property. This evidence furnished by the witness himself is sufficient to show what was Ralston's condition at that time. But what doubt can remain when the testimony of the other witnesses, both for complainant and defendants, is considered—that before and after that date he was imperious, irascible, violent in temper, and resentful of any attempt at control. If the witness Olmstead speaks truly, his condition and acts at that time can only be accounted for by the fact that he saw Ralston when neither mind nor body had rallied from the effects of a drunken debauch. If so, his testimony throws no light on this case, for the question is not what was his mental capacity when he was drunk, but what was it when he was sober.

Aside, however, from the foregoing consideration, it is only necessary for those accustomed to the examination of the testimony of witnesses to have their attention directed to the remarkable character of the narrative of this witness, in order that it may be certainly accorded the estimate to which it is entitled.

According to his statement, he was in the presence of one who was then simply a maudlin, driveling imbecile, with no will to control his own action, and with no mental capacity to do any valid and binding act. To such a person he, a lawyer, represents himself as delivering a long harangue and remonstrance of two hours' duration, and wringing from him the confession that he was everything that was vile, while his wife was everything that was pure and dutiful; and finally, while he was in that utterly irresponsible condition, exacting from him a solemn affidavit, which he (Olmstead) signs as an attesting witness. Before such a physical and mental ruin as he describes, a man of intelligence could only have been silent, even if all sympathy were wanting in the contemplation of such a human wreck.

But this is not the most remarkable feature in Olmstead's testimony. It must be borne in mind that this testimony was being given by him in a case where the particular object was to prove by him that Ralston by reason of excessive drink was an imbecile, easily

controlled by others, and incapable of making a valid deed. Of course, when Olmstead made his remarkable visit in 1881, he could not have anticipated that in 1883 a litigation would spring up in which this question would be involved and about which he would be called to testify; and yet, strange to note, he not only testifies to seeing Ralston in a condition from which he judged him to be mentally imbecile, but going further he narrates, through two printed pages, an extended conversation he had with such imbecile, in which among other things there most strangely and opportunely occurred an offer on Ralston's part to deed all of his property to his wife, with the reply on the part of Olmstead that he, Ralston, was not capacitated to make a deed to any one. The case of the complainant is made out by this witness in all of its details in his narration of the occurrences of one single interview, for he testifies (page 76) he "never saw him but this one time," although he says (page 73) Mrs. Ralston came to his "office several times afterward."

We respectfully submit that the testimony of this witness is not entitled to any weight in the consideration of the question of Ralston's mental capacity: first, because of the remarkable and incredible nature of the testimony in itself; and second, because if true it relates solely to his mental condition while either drunk or before he had rallied from the effects of extreme drunkenness.

The witness Sarah A. Hubbard, (page 77,) who is the wife of Ralston's, landlord, represents Ralston as being drunk most of the time, and expresses the opinion that he was incapable of transacting business. Her testimony, short as it is, is filled with contradictions and inconsistencies. In one sentence she says he could be very easily influenced when drinking. In another sentence she says he was very abusive and ugly when under the influence of liquor. In one place she speaks of his wife handling him like a child, when drunk. In another she tells of her trying for two hours to get him from the front door half way up stairs. Even she limits her testimony on the subject of his mental capacity to the statement that in her opinion (page 78) he was not capable of transacting business, "as men ordinarily attend to their business."

This witness testifies (page 78) that she does not know Ralston's condition when he signed the deeds.

The witness Henry A. Hubbard, who rented the house to Ralston, and who is the husband of the former witness, does not go as far as his wife does in her testimony. (See Record, page 79.)

He says he has "seen him drunk on many occasions," and that "he would average a spree once a week." He admits that there were occasions when witness knew him when he was fit for business. He sums up his opinion as follows: "I would not judge Mr. Ralston to be a capable business man, or fit to do business as men ordinarily do it." The opinion thus expressed by this witness doubtless puts in words what the other witnesses mean when they say that in their opinion he was incapable of doing business. The direct interrogatory, No. 3, (on page 68 of the record,) to which all these answers are given on this subject by the different witnesses, is in the alternative as to his ability to transact any business, or in such way as men ordinarily attend to their business. There is no where a question directing the attention of these witnesses to the enquiry whether his mental condition was such at that time that when sober he could have appreciated and understood the nature of a deed made by him to property, and whether when sober he was capable of comprehending the nature of such a transaction. This criticism applies to all of the witnesses examined by interrogatories at Stamford, Conn.

There is an evidence of ill-will on the part of Hubbard and his wife towards Ralston, and the learned judge before whom this case was tried in the Circuit Court, very truly remarks, in commenting on their testimony, that "they speak of him with far too much bitterness to leave the mind under the impression that they regarded him as an imbecile."

The reason for this ill-will appears to have been well grounded. On page 79 of the record, Hubbard, speaking of Ralston, says, "On one occasion when intoxicated he threatened to shoot me, and on another occasion I sent men there to work, to do something they had requested me to do, and he threatened to shoot them if they did not leave the premises." And again he says in his testimony, "When sober his dependence seemed to be upon his money, as if that were all that was necessary to entitle him to the right to brush every one out of his way. He boasted that his money privileged him to do pretty much as he pleased. That was the habit of the man."

The evidence shows that Ralston was purse proud, insulting and violent. These were sufficient reasons why he should be most heartily disliked, but they are not evidences of imbecility. The fact that

these offensive qualities angered Hubbard and his wife, show beyond question that they did not regard him as an irresponsible imbecile.

This witness also says that he knows nothing as to Ralston's condition at the time the deeds were executed.

Patrick McCarthy (Record, page 83) the gardener, also testifies to excessive drinking by Ralston, and gives same opinion as other witnesses that he was incapable mentally of attending to business "as men ordinarily attend to their business." He represents him as easily influenced and yet says he "never saw him influenced." He says he does not know what his condition was when he signed the deeds.

Dr. Hurlburt testified (Record, page 81) that he was his attending physician. His visits to him were when he needed his services as a physician on account of drink. He does not testify to seeing him at any other time. He testifies also in the stereotyped phrase of the other witnesses that Ralston, during the time was incapable of attending to business "as men ordinarily attend to their business." He says that he does not know anything about his particular condition at the time of the execution of the deeds, but adds if the deeds were signed about that time, "he could not have been a sound man mentally and physically at the time he signed them." Although his attention is particularly directed to the point, he does not say that he could not at the time have appreciated and understood the nature of the act and could not have intelligently exercised his will in signing the deeds.

The foregoing is the substance of the testimony of all the witnesses who were examined in Connecticut. They were all strangers to Ralston, and necessarily much less competent to judge of his mental condition than those who had known him all their lives, whose testimony will be cited and commented on later. All of these strangers were justly scandalized and disgusted by his drunkenness and his profligacy, while some of them, if not all, were personally offended by his arrogance and his violence.

Disposed as they evidently are to paint him in the darkest colors, not one of them testifies that in his sober hours he was incapable of making a valid deed; and with the exception of the witness Olmstead, the presumption is that not one of them knows what degree of intelligence is requisite to enable one to make a valid deed.

Upon the same point the following witnesses were examined in New York.

Jno. O. Brintuall, a coal dealer (See page 108) says he knew Ralston in 1880 and 1881, that he saw him drunk a number of times and hardly ever sober—that he was extravagant and wasteful, and without a proper conception of the value of property, and that "he was not capable of transacting his business as persons ordinarily do."

John Sheeran, a barroom keeper, (See page 117) testifies substantially to the same effect. He naturally saw Ralston when drunk.

Sister Margaret O'Brien, a witness for complainant, who knew him for five years and had an infinitely better opportunity to judge of his mental condition than any of the other witnesses, says that while he was an habitual drunkard, "in 1880, 1881 and 1882, his mind appeared to be all right; it had not been impaired, so far as I know." (See Record page 111). We beg to adopt the comment on this testimony of the learned judge, who tried and decided this case, in the following words: "Her truthfulness is apparent in every utterance. She saw Ralston frequently. She watched him closely. His mind was 'all right' in 1880, 1881 and 1882, except when he was drunk. Then he was 'incapable,' she thinks, but she does not know. She has none of the characteristics of the swift witness. Her *amour propre* had not been offended by the purse proud insolence of Ralston, as were the Hurlburts. Accustomed to view the suffering and the afflicted, her judgment is not startled from its propriety by the spectacle of drunkenness or prostration. Unlike the physician, her observation is not confined to the moment of frenzy when the solicitude of friends has prompted the cry, 'run for the doctor.' She is the patient, watchful, even tempered, and unruffled nurse, and moreover her veracity is unquestioned."

Dr. W. G. Wylie (page 111) testified to Ralston's drunkenness and incapacity to attend to business but he says he saw him when he was sick and "needed a doctor." He does not profess to have been acquainted with his mental capacity at any time except when sick from drink.

Dr. William R. Pryor never saw Ralston until December, 1882, and his testimony can, in consequence, be passed without comment.

Horace E. Jones who had been Ralston's tailor, and who knew him seven or eight years, says (page 115) that he was an excessive drinker, "In 1880, 1881 and 1882 he could not tell, though he often thought that his mind was impaired somewhat by the use of liquor." He was not sober more than half his time. He seemed quite well when sober, except the past year of his life. Does not think he was capable of attending to business because he was too much under the influence of liquor.

Excepting her own evidence, of which we shall speak separately, the foregoing is in substance all of the testimony offered by the complainant on the subject of Ralston's mental capacity.

When the testimony of these witnesses is carefully examined and analyzed it will be found to amount to about the following:

1st. The witnesses pronounce him to be a man who drank to excess and who was frequently, and some say, habitually drunk, and it is to be remarked that they were all strangers to him whose attention was principally attracted to him by the fact of his being drunk, and who testifying years afterwards, recall nothing else particularly about him except his drunkenness. It is natural that they should, after the lapse of time, recollect his drunkenness as having continued all the time.

The last witness, Horace E. Jones, who had known him for seven or eight years, and whose tailor-shop he made his headquarters where he received his letters, &c., estimates that he was sober half his time.

2d. Most of these witnesses think that his mind was impaired by excessive use of liquor, but to what extent they do not express themselves with sufficient definiteness to enable a court to base any conclusion on their evidence.

Sister Margarett, who had far the best opportunity of judging of him, did not think his mind was impaired in 1880, 1881 and 1882.

Horace E. Jones, who had next best opportunity of judging of him, says he could not tell, but often thought that his mind was somewhat impaired by use of liquor. If this witness, who knew him intimately for so long, was in doubt as to whether his mind was even somewhat impaired, he certainly could not have been an imbecile incapable of understanding the nature and purpose of the act when he signed the deeds.

A man's mind may be impaired to the extent that he has not the mental vigor and activity which he would otherwise possess, and he

may for all purposes be in the eye of the law a sane man. As was true in the case of Ralston, such a man is allowed to go at large, no guardian is appointed for him, and he is dealt with in business transactions of greater or less magnitude. The particular question upon which we are now engaged, is that raised by the amendment to the bill, whether at the time he signed the deeds he had the ability to comprehend and did comprehend the nature and purpose of the act. No witness has testified that his mind was so impaired at the time that if then sober he would not have such ability.

3d. These witnesses express the opinion that Ralston was not capable of attending to business, "as men ordinarily attend to their's." This can only be construed to mean that he did not have the mental vigor, or the sobriety, or the business habit, which would have enabled him to make a successful business man; that he was reckless, and could have been easily imposed on and swindled. This is as far as the testimony goes, and it is as far as the interrogatory goes to which this testimony is given in reply. The witnesses are not asked whether in their opinion, when sober, he had the mental capacity to comprehend the nature and importance of the transaction when he signed the deeds, and we are not to presume that the witnesses intended their answers to be so construed. When the witnesses say that he was not capable of placing a proper estimate on the value of property, they evidently refer to his wasteful extravagance, in which he threw away money lavishly which prudent men would have saved. This testimony is usually in connection with instances given of his extravagance.

In the consideration of all the testimony taken by the complainant in Connecticut and New York, it should be remembered that it was taken, in the absence of counsel, by commissioners, in answer to certain written interrogatories, and that there was no opportunity for thorough cross-examination of the witnesses. All of the witnesses in Connecticut were examined by the same commissioners, and there is an identity of phrase and expression in the written answers of each of these witnesses which proves beyond question that the answers were not written down in the language of the witnesses, but in the language of the commissioners. In testimony, particular words are extremely important, and it is evident in this instance that wherever the testimony came from, the words in which it is expressed came from the commissioners, and not from the witnesses. The same thing is

true to a large extent of the witnesses examined for the complainant in New York.

On the contrary, all of the witnesses for the defendants, with one exception, (J. H. Dobbs,) were examined before a Court Examiner, with the most skillful counsel present, representing the complainant and subjecting each witness to a most searching and thorough oral cross-examination. Their testimony was almost all taken down by a stenographer, and is before the Court in their own words just as it fell from their lips.

The last witness on the part of complainant, testifying on the subject of Ralston's mental capacity, is the complainant herself, who was also examined by commissioners on written interrogatories in the absence of the counsel. (See Record, page 94.) She does not testify that when the deeds were signed in 1880 Ralston was drunk, or that he was mentally incapable of then making a valid deed. If she had done so she would be most overwhelmingly contradicted by other unimpeachable witnesses who were present at the time, whose testimony will be hereafter cited. She does represent him as having been, during all the time they were in Stamford, excepting the first three months, continuously and extremely drunk, and says his mind was weakened from the use of liquor. A contradiction of this is found in the letter dated at Stamford, July 28th, 1880, a copy of which is set out in the Record, page 275. It was signed by Ralston, but the body of the letter is in the handwriting of the complainant; in it he says "I am enjoying good health." She says that at the time of the execution of the deed in 1881, he was drinking all the time, and that his mind and body were weakened and impaired thereby. Even she does not state that he was not then capable if sober of understanding and appreciating the nature and importance of the act.

Her testimony is filled with contradictions which must discredit it. Limiting our examination of these contradictions at this time to those which relate to the question of his mental capacity, she represents him as drinking all the time the second deed was signed, and that his mind and body were then so impaired that he was "extremely weak and childish," and yet she says that he coerced her to sign that deed, telling her she must do it, and threatening that if she did not sign it she should not remain his wife five hours. (See Record, page 97.)

She exhibits to her depositions an affidavit of Ralston, that he will not drink any liquor for two years (See Record, page 100). The

affidavit is April 8th. She says in her testimony that he kept the pledge not quite two weeks. (See page 97). The deed of 1881 is executed April 19, 1881, eleven days after the date of the affidavit.

On page 277, of the record is the copy of a letter from Ralston to Turpin, the signature to which was by Ralston, but the body of which was proven to be in the handwriting of the complainant. It is dated Stamford, April 18th, 1881, which was the day before the last deed to Turpin was signed. In it Ralston, using his wife as an emanuensis says: "My health is splendid."

On page 278 of the Record is a copy of a letter from Ralston to Turpin, the signature of which was by Ralston, but the body of which was in the handwriting of the complainant. It was dated Stamford, April 27th, 1881—nine days after the last deed made to Turpin. In it Ralston says, "I have quit drinking for two years and hope to keep it." This testimony is conclusive that at the time Ralston signed the deed of April 19th, 1881, he was sober and in his right mind. The complainant herself testifies that he did not drink after signing the affidavit on the 8th of April, for "not quite two weeks." In the letters of April 18th, and April 27th, we have the evidence of both Ralston and the complainant that his health was splendid and that he totally abstained from liquor from April 8th certainly until after April 27th.

Further comment would seem to be unnecessary on her testimony that at the time this deed was signed Ralston was "drinking all the time," and that mind and body were so impaired thereby as to make him "extremely weak and childish."

Our discussion is not now extended to the question of undue influence, but is limited solely to the question of whether he was mentally incapacitated to understand and appreciate the character and importance of the act when he signed the deed. We respectfully submit that the foregoing testimony by the complainant and her witnesses, even if taken alone, falls utterly short of proving such incapacity.

The defence on this point is not, however, limited to the demonstration of the insufficiency of the complainant's testimony. We go further, and show affirmatively that he had sufficient capacity to make a good and valid conveyance.

No higher evidence can be given that a man is recognized as sane and capable of making a valid contract than the proof that persons deal confidently with him in business, and contract with him as to

valuable property in the confidence that he will be bound by such contracts. After the date of the last deed to Turpin, Ralston made the following contracts under his hand and seal, by which large amounts of property are to-day held by parties to whom he conveyed it.

1st. June 28th, 1881, Ralston joined six other parties—viz.: his step-father, Dr. Bozeman, his aunt, Mrs. Laura Smith, and her children—in a contract for the settlement of a litigation in which Ralston agreed to pay, as his portion, ten thousand dollars to Mrs. Smith and her children, and to execute a mortgage on valuable real estate in the City of Macon to secure the deferred payment of nine thousand dollars. (See clause first of said contract, Record, page 234). The Record (page 216) shows that the leading counsel for complainant in the present litigation was the counsel for Mrs. Smith in that litigation against Ralston which was settled by the payment of one thousand dollars cash and a contract by Ralston to pay nine thousand dollars, secured by mortgage executed by Ralston. Ralston then lived in New York. Mrs. Smith and her adult children and Dr. Bozeman, the other parties to the litigation, all lived in New York. Whatever his mental condition was at that time, they certainly all knew it. If he was then the imbecile it is now sought to prove he was, he ought certainly to have been represented in all that important transaction by guardian. There can be no doubt that all the parties and counsel connected with that transaction regarded him as sane and capable of making a valid contract.

2d. In the same agreement Ralston, in clause third (see page 235) agrees to deed to Mrs. Smith, with certain limitations and conditions, two brick stores in the City of Macon, as a consideration for the surrender by Mrs. Smith and her children of a remainder interest in the Ralston Mansion house, in Macon, (see bottom page 235;) and deeds were executed by Ralston in accordance with such agreement.

3d. Although the deed is not set out in the record, the fact is incidentally disclosed in the testimony that, subsequent to the date of the last deed to Turpin, the Ralston Mansion house, in Macon, was sold and deeded by Ralston to J. M. Johnston for twenty thousand dollars. (See Record, page 232).

4th. On the 30th day of January, 1882, Ralston deeded to his wife, the complainant, two brick stores, in consideration of ten thousand dollars and the surrender of her contingent interest in the Ralston Mansion house.

John H. Dobbs, now of New York, but formerly of Macon, who had known Ralston for twenty years, and who saw him frequently in both places, was called in to act as an attesting witness to this deed. He testifies (Record, page 125,) that "At the time he signed that deed he was all right, so far as I know. He was able to attend to busines."

5th. On the 21st day of October, 1881, Ralston made his last will, in favor of the complainant. Of this will and the pretended attempt at probate, more will be said hereafter.

6th. On the 27th day of November, 1882, at 3 P. M., (see Record, page 101), Ralston executed an agreement, with great formality, to consent to "a bill of separation" from complainant, if he violated his pledge to abstain from liquor for the period of twelve months.

These important business transactions which these various parties, including the complainant, had with Ralston, in which large sums of money were paid out, and in which deeds and mortgages for valuable property were accepted from him by those who were in the best position to know and judge of his mental condition, demonstrate far more conclusively what was then their judgment as to his mental capacity, than could any testimony now given by them on the subject.

In addition to the foregoing important instruments executed by Ralston subsequent to the date of the deeds to Turpin, his letters to Turpin and others were introduced in evidence, and are set out in the Record, page 274 to page 283. The majority of these letters were in the handwriting of the complainant, but with only one exception they were signed by Ralston himself. The exception was a letter of condolence to Turpin on the occasion of the death of one of his children. These letters extend in dates from June 24th, 1880, to November 11th, 1881. The letter of June 24th, 1880, addressed to J. M. Ogden, was written in full by Ralston. The Record is not explicit as to whether the body of the letter of May 6, 1881, was written by Ralston. There is no question, however, that he wrote the whole of the letter of June 24th, 1880. It is clear, concise and cordial, giving no evidence of weakness of any kind, but to the contrary.

The originals of these deeds, &c., and of the letters, were exhibited in Court for the examination and scrutiny of the learned Judge who tried the cause. He says, (page 299 of the Record,) "His signatures are clear and steady, and indicate none of that tremulous quiver which characterizes the handwriting of the inebriate who is suffering from the effects of a debauch." In speaking of the agreement for "a bill of

separation," executed by Ralston November 27th, 1882, Judge Speer, who made a personal examination of the original paper, says: "This paper is executed with great formality. Its interlineations are marked with the initials of Ralston, and it is signed by him with an easy and graceful sweep of the pen which indicates no diminution of nervous control."

The foregoing evidence would seem to be sufficient to establish the fact of Ralston's mental capacity at the time of the making of the deeds. But the defendants go further and show the fact affirmatively by those who knew him at the time, and who had known him and all his mental peculiarities from the time of his childhood.

Mr. Alexander Proudfit, of Macon, who had known Ralston since 1869, testifies that at the time of making the deeds of August 28th, 1880, Ralston "was perfectly sober," (see page 128,) and that "he was perfectly rational." He narrates in detail the circumstances attending the signing, the asking for the deed when he arrived, his reading it before signing it, and his conversation with the witness subsequently on the same day in which he gave freely his reasons for executing the deed. The testimony of this single witness if there were none other would be sufficient to overthrow every presumption raised by the evidence of the witnesses from Connecticut and New York, for their testimony is only pertinent as raising the presumption that one of the habit and condition testified to by them must have been irrational in the intervals of time when they were not present.

George B. Turpin testifies (page 209) that at the time the deeds were signed, in 1880, Ralston was sober and "perfectly rational. He understood and knew exactly what he was doing and intended to do what he did."

J. Monroe Ogden, who also had known Ralston all of his life, and was with him in Stamford the day before the deed of August 26th, 1880, was signed, and also with him in New York on the day the deed of August 28th, was signed, (although not present at the immediate moment of signing,) testifies (page 217) that on both occasions Ralston "was perfectly sober and rational." This testimony of these three witnesses who were present when the deeds were executed in 1880, was not attempted to be controverted in any way; and the record discloses

the remarkable fact that although these three witnesses were examined orally and cross-examined at length in person by the learned counsel for the complainant, not a single question was asked them on cross-examination, as to their testimony that Ralston was "perfectly sober and perfectly rational at the time of the execution of the deeds."

The only other witness who was present when the deeds of 1880 were executed who testifies in the case is the complainant, and she does not anywhere say that at the time of signing the deeds of 1880 Ralston was either drinking or irrational. Nor does she testify that he was either drinking or irrational at the particular time of the execution of the deed of April 19th, 1881. She would certainly not have omitted to do so with the utmost definiteness if such had been the fact. One of the attesting witnesses to this deed was Horace E. Jones, who was examined as a witness for the complainant in this cause. (Record, page 225.) He does not testify that Ralston was either drinking or irrational at the time of the execution of the deed. (Record, page 115.) He knew that the litigation in which he was called to testify as a witness, was for the purpose of cancelling that very deed he had witnessed, on the ground that Ralston was then mentally incapable of making a deed by reason of excessive drink. He had known Ralston intimately for seven or eight years and could tell whether he was drunk or sober. If he had been drunk or irrational at the time of the execution of that deed in April 1881, the witness Jones would certainly have so stated in his testimony. Furthermore it cannot be doubted that complainant's counsel, in preparing the written interrogatories for him, would not have omitted the question as to this vital and controlling point, if it had not been known by them that they could not prove by that witness that at the time of the execution of the deed of 1881 Ralston was either drunk or irrational.

On the general question of Ralston's mental capacity at that time and subsequently, in addition to the three witnesses already cited, the following were introduced by the defendants.

Wm. H. Ross of Macon, met Ralston, in New York, in August 1880, and says he was at that time perfectly sober and perfectly rational (page 135 and 136). He testified that Ralston was a man who drank to excess, but who had sober intervals.

John E. Jones, Bank and Railroad President, who knew Ralston, both before and after 1880, in Macon and in New York, testified page 148, that he had business capacity when sober. "He was a smart fellow." That "when he was sober he certainly knew what he was doing. He was a man of good sense."

Alex. Block, of Macon testifies, page 167, that he was with Ralston for ten days in the Catskill Mountain in 1881, that he was with him every day in the same house and that "his condition was as straight as any man I know of," and that he was perfectly rational and in possession of his mental faculties.

Henry Horne, who was one of the attesting witnesses of the will of December, 1879, testifies (see Record, page 201, et seq) that Ralston was "at himself and knew what he was doing when the will was executed" and he details what Ralston then and there did and said which shows this to be true.

Horace E. Jones who was also an attesting witness to this will, and who was examined by written interrogatories on the part of the complainant not only fails to testify to any mental incapacity or drunkenness of Ralston at the time of the execution of the will, but is not even asked a question on the subject by the complainant's counsel.

Solomon Waxelbaum, of Macon, who knew Ralston from boyhood, and who saw him frequently after he moved to New York, testifies (page 199) to a particular conversation which he had with him in New York, near Union Square in 1882 which lasted from five to ten minutes. He says he "seemed to be in good mind, and talked as sensibly as any other man would."

J. H. Dobbs, who formerly lived in Macon, and who knew Ralston, both in Macon and in New York, was one of the attesting witnesses of the deed made by Ralston to the complainant January 30th, 1882. He testified that when Ralston executed the deed "He was all right, so far as I know. He was able to attend to business."

In addition to the foregoing witnesses who testified as to his mental capacity at the particular time in question a number of other witnesses residing in Macon were examined, who testified generally as to his mental capacity, &c.

W. D. Palmer, a witness introduced by the complainant, who knew Ralston both in Macon and in New York, both before and after the making of the Turpin deeds, testified, page 189, in answer to the question as to Ralston's capacity to manage business, that he was only incapacitated while he was on a drunken spree.

The complainant, on page 96, testifies as follows: "He (Ralston) bought me a turn-out for nearly $4,000.00, and sold it for $42.00, I think." This is doubtless narrated as an evidence of his imbecility. Relative to this testimony we remark, that the witness does not state it as a fact within her knowledge, but says "*I think.*" Such an expression may be recognized as equivalent to the expression of an opinion by a witness, but never as the assertion of a fact. It is, therefore, not reliable as testimony. Again, if there was anything of it, there is certainly something connected with it not disclosed by the evidence. Such a transaction could only have been made by an absolute lunatic or imbecile, or by some one intoxicated at the time beyond the point of a glimmering of reason or memory. A man who, when not intoxicated, could be capable of such a transaction could not possibly be recognized by any sane man as competent to enter into the large and important contracts which were entered into by Ralston subsequent to April, 1881, and which are set out on pages 30 and 31 of this brief.

We respectfully submit that an examination of the foregoing testimony on both sides establishes two propositions.

1st. That the evidence on the part of the complainant fails to show that Ralston, when sober was incapacitated mentally to make a valid deed conveying his property.

2d. That he was sober and rational at the several times of the execution of the deeds to Turpin, August 26th, 1880, August 28th, 1880, and April 19th, 1881.

3d. That the evidence on the part of the defendants establishes affirmatively that when sober, Ralston was full capacitated mentally to make a valid deed disposing of his property.

There is no special principle of law involved in this branch of the case except the question of the degree of mental capacity necessary to qualify one to make a valid deed. See Bigelow on Fraud, page 281; 30 Wis., 78, 6 Casey, 89; 6 Wright, 114; 1 Cowen, 207; 26

Wendell, 255; 25 New York, 970; 9 Grett, 530; 12 Pick, 212; 2d Ire. Eq., 456.

On the foregoing review of the testimony and the citation of authorities in connection therewith, we submit that the learned Judge was correct in the following judgment pronounced by him, which is found on page 306 of the Record:

"Not only does the complainant fail to show such weakness of mind on the part of Ralston as will invalidate the deeds, but the evidence demonstrates that at the time they were made he was abundantly capable to dispose of his property as he might think proper."

The Nature of the Personal Relations Between Ralston and the Complainant.

Assuming that it has been shown by the foregoing examination of the evidence that Ralston did have the necessary mental capacity to make a valid deed at the time of the execution of the deeds to Turpin, trustee, the next inquiry is, whether the execution of the deeds was his own free and voluntary act, or whether it was the result of undue influence on the part of Turpin. We will endeavor to show by the testimony that it was his own voluntary act—that under all circumstances it was a perfectly natural thing for him to do, and was the consummation of his well-defined intention of more than ten years previous.

In the discussion of the question of undue influence, the nature of the personal relations which existed between Ralston and the complainant, both before and after marriage, is a pertinent and important consideration in the examination, for the purpose of elucidating the inquiry whether, under the particular circumstances of the case, the gift by Ralston to Turpin's children of half his estate was a natural thing to do. If it was an unnatural thing for him to do, something which he would not presumably do of his own free will, then there might arise a presumption that the act done was the result of the influence of another. If there was nothing unnatural in the act, then there would arise no such presumption.

To illustrate by the particular matter before the Court: if the complainant had brought to Ralston at the marriage altar the purity of innocent and unsullied maidenhood, and had during her married life continuously ministered to his happiness with the tenderness and love of a devoted and self-sacrificing wife, it would have been unnatural, under any ordinary circumstances, for the husband of such a wife to give the half of his estate to strangers in blood. Such an act unexplained would raise a presumption of strong influence exerted by another, which could only be rebutted by strong and clear proof to the contrary.

If, however, there was nothing in their relations, either before or after marriage, which entitled her to the love, or even the esteem or

respect of her husband, then such a presumption would not arise; and if from any cause (such, for instance, as the personal relations of the donor and the donee,) there were any such presumption, it would be the more easily rebutted by explanatory evidence. If she was a bad woman, she is none the less entitled to every right of person and property under the law that the best person in the land would be, and the evidence that she was such a woman would not be admissible or pertinent to deny her on this account the full protection of the law. But the question whether she was such a woman, with the consequent influence of that fact upon her relations with Ralston both before and after their marriage, is a most pertinent one for the purpose above indicated.

The evidence shows beyond controversy that when Ralston was a young man, but a few years past his majority, he first met the complainant at a time when she was a common prostitute—a bidder for promiscuous commerce in, and an inmate of, a public bawdy-house. What her exact age was the Record does not disclose, for in the answers to the written interrogatories propounded to her (page 94), her age is left blank. That she was considerably older than Ralston may be legitimately concluded from what she says in her letter to Turpin (page 287). It was dated October 10th, 1882, when Ralston was thirty-three years old. In it, as a reason why she must protect her pecuniary interest, she says: "I am not young."

In the personal intercourse in the brothel which ensued he became possessed with a strange infatuation for her, which dominated all of his subsequent life. She became ostensibly his mistress, but during all the time she remained in Macon she continued still to be the inmate of the various houses of public prostitution in the city. There she received the visits of Ralston and engaged with him in drunken debauches, which were frequently marked by violent quarrels and fights between them. (See testimony of Lieutenant Wylie, of the police, (page 162), where he says, "They were very often fighting," and gives particular instances. In response to the questson as to her drinking, he says: "It was a common thing for her to get drunk at every ball they had down there." At the same time that she was pretending to be the mistress of Ralston, wasting his substance in riotous profligacy and disgracing him in the eyes of all decent people, she was in reality a public prostitute, living first in one public bawdy-house and then in another, and having illicit intercourse with other men. (See testimony of Herbert Brown, Record, pages 153 and 4; Henry Horne,

page 202). She dominated him, and he was strangely given over to a bondage which was at once miserable and hopeless. For years they lived thus in Macon. But she brought him no personal happiness as a compensation for his fall. No single witness testifies to a single word or act of kindness or tenderness on her part, either before or after marriage. The defendants, both in their pleadings and evidence, put distinctly in issue the question of their personal relations. They proved that he and she lived together as miserable brothel brawlers, and that they were habitually fighting together in their drunken orgies. Before the accusation and the proof the complainant is dumb. If it was true that the drunken fights between them were occasional and the exception to their general experience, if at other times their intercourse was harmonious and affectionate, there were necessarily scores of men in Macon, who were entirely familiar with their daily lives, by whom it could have been proven. But not one witness was produced to that effect; and it must be accepted as a proven fact, that during the years of their intimacy preceding their marriage, their personal relations were of the unhappy character stated by the witnesses for the defendant.

As to her character and occupation, the Court is not left to the representation of others. In answer to the cross-interrogatories propounded to her whether she had not been the inmate of the several houses of illfame in Macon before her marriage, and whether Ralston had been in the habit of visiting in those houses, she replies, "I decline to answer upon the ground that the answer would tend to bring infamy and public contempt upon myself." But while thus careful of her reputation, she, in her testimony, voluntarily and unnecessarily places upon the record the statement, that while she was a public harlot, she had by her presence therein, desecrated the dwelling house of Ralston's mother. That she may parade and gloat over that fact, she is willing to invite "the infamy and public contempt" for fear of which she refuses to reply to the interrogatories as to her residence in bawdy houses.

The only exception she makes to her express and tacit admission of the constant quarrels and fights and the unpleasant relations between them both before and after their marriage, is found in the following statement in her testimony on page 66 of the Record: "After our marriage we always lived unpleasantly when he was under the influence of liquor, but when sober we got on well together." As in her testimony she exhausts all her command of language to show that

after their marriage he was, with few unimportant exceptions, drinking excessively all the time, it is not necessary to add anything to the picture which she herself presents of the misery and unhappiness which continuously characterized their intercourse. She herself draws and presents the melancholy picture. She says that at times she "tied him down" (See Record, page 66) and this she did, when as she testified on the same page, "he was physically helpless and weak; a child could knock him down." Again she says on the same page, that to control him she would "hide his clothes and keep him in his night-gown." How constantly she was in the habit of thus outraging him may be surmised from the fact that more than one of her witnesses, testifying as to different times and in different localities, make mention of the fact of Ralston's going about the house in his night-gown as an evidence of his imbecility and insanity. She speaks twice in her testimony of his habit of striking her and running, and each time she is particular to say that he struck her from behind, and not from the front. Turpin (Record, page 211) says: "Jimmy took me in a room and was talking to me, and his wife came in the room where we were. She had a lot of hair in her hand and told me Jimmy had pulled her hair out. Jimmy's face was a little bruised. I asked him what it was. Ida said Jimmy had pulled the hair out she showed me. Jimmy said she was a damned liar, she had combed it out. He said that in her hearing. I told him I did not want to hear any more such talk as that. He told her to go out of there. He said Ida made the bruise on his face." The complainant with the full opportunity to contradict this statement, does not do so.

With such outlines it requires no effort of the imagination to fill in the disgusting and revolting details of the picture of their personal relations from the date when he first met her as a public harlot in a bawdy house, to the time when he died and left her behind, the sole representative of a once honored name. In this picture there is the presentation of no feature which would naturally inspire him with the grateful desire to make her the object of his bounty, nothing which, when that bounty is conferred in part upon another, will authorize even the suggestion that the act was violative of the promptings and desires of his heart, and that the explanation must be found in the fact of an extraneous and potent influence, which mastered and controlled his will to the violation of both, his duty and his inclination. She had not left father and mother and home, and in the trust of innocent girlhood, confided to his care all her future, for better or

for worse. If such had been the case even if their mutual hope of matrimonial happiness had been disappointed, the sacrifice she would have thus made for him would have nevertheless, required that her welfare should be still to him the subject of his consideration and solicitude. Nay more, if, after their association began, however unholy it may have been in its origin, she had been kind, tender and gentle, ministering to him in sickness and in health with womanly devotion and affection, it could be urged with great power of argument that the natural impulse of his grateful affection would have rebelled against his diverting from her enjoyment after his death, any considerable portion of his property.

But none of these powerful and controlling incentives to the love and gratitude of a man are found in the history of their union and intercourse. When she first met him the innocence and purity of girlhood had long since been sacrificed by her, and in the public marts of lust, she was shamelessly selling her person to every one who chose to buy. When she found him he was to some extent a fast and dissipated young man; but he had travelled only a short distance on the downward road, and he still had the association and the love of a wide circle of relatives and friends. Then when good influences would have saved him, her fatal and all powerful spell was flung upon him, and from the day when she first claimed him as her captive, she never relented in her purpose. She tells in her testimony (Record, page 99) that it had been arranged for him to marry her, as far back as 1876, and it had been delayed. The efforts of those who loved him, for the four succeeding years, held him back from the pit she had digged for him. At last, lured a thousand miles away from their influence, in secret she accomplished the purpose of eight years. Had she cared truly for him, had not his money been her object, she would not have been the promotor of a marriage to consummate which she knew would be to work his utter ruin—to sunder the last remaining ties which bound him to family and friends, and to forever render him an outcast from all decent association. Had her motive not been entirely sordid, after a marriage contracted by him at such a fearful cost, she would have endeavored by her tenderness and devotion to have in some measure compensated him for the sacrifice he had made. The evidence shows that this she did not do, but that the quarrels and violence and debaucheries in which she was a chief actor with him in the brothel, marked and embittered the whole course of their married life.

The learned counsel in his argument in the Court below dwelt on the unnaturalness of Ralston's conveying a large portion of his property to Turpin's children, instead of waiting to ascertain the effect upon his new made spouse of *the novel relation of husband.* It is certainly a sufficient reply that there was no ground to hope that the childless mistress of many years, would in old age become the fruitful wife. On this point we cite the Court to the following comment on the same made by Judge Speer in his opinion. (Page 305.)

"With regard to the other suggestion, there seems to have been little novelty or change in the relations between the complainant and Ralston, consequent upon the form of marriage had in January 1880. It is very evident that this form, for several years past, had been regarded by both parties as superfluous. Ralston knew that no children would follow this unholy union; nor is it unnatural that he should decline to bestow all of his property upon a wife whose character had degraded him and destroyed every hope of reformation, and destroyed every anticipation that he could regain that position in life to which by birth and fortune he was entitled. He provided amply for her comfort; but in the opinion of the Court, it would have been far more unnatural and shocking to the moral sense had he forgotten the friend of his childhood, his guardian, and his trusted friend and the children of that friend, to whose affectional memory he had committed his tomb, and for whom he had promised his mother to provide, in order to bestow his magnificent patrimony upon a woman whom he had made his wife, but whom he had found a harlot in a brothel."

With such as the indisputable history of their association, both before and after marriage, we respectfully submit that if he had made no provision whatever for her out of his property, his failure to do so would not have legitimately raised any presumption of a violation of natural duty or impulse, due to the dominating influence of another. Much less is there any ground for such presumption where only a portion of his property is given to others, and when, as we shall endeavor hereafter to show, to thus give it, had been the unvarying purpose of his life for more than half a score of years.

Ralston's purpose to give a portion of his Property to Turpin's family.

The defendants do not rest this case on the mere assertion that Ralston was capable of disposing of his property, and that it was perfectly natural for him to dispose of it in the manner he did. Nor do they stop at the assertion that the conveyance of the property to Turpin's family was the free and voluntary act of said Ralston, but they go further and say that the purpose so to do had been deliberately and voluntarily formed at least eleven years before the execution of the first deed to Turpin, and that no act done or word spoken by him in that long period of time ever indicated the slightest deviation from his fixed determination in that regard. Not a scintilla of proof of the slighest desire or intention of any change of such purpose was shown by the evidence on either side. The defendants distinctly put in issue, both in the pleadings and the evidence, that such had been his long cherished purpose, and proved a most remarkable and unquestionable series of acts done, and avowals made, by him, indicative of his fixed resolution to this effect. The complainant is silent before the allegation and the proof. Neither she, nor any witness for her, testifies to anything said or done by him to the contrary.

Turpin had been the trusted friend of Ralston's father. When his mother became a widow Turpin was ever faithful to her interests. When she married a second time, Ralston, then nineteen years of age, voluntarily selected Turpin as his guardian. When Ralston became of age Turpin settled with him in full his accounts as guardian and turned over to him all that was due him. His accounts are all set out in the record, and are before the Court unchallenged by a single criticism of accidental mistake or intentional wrong. Both members of the family recognized that they owed much to the fidelity and friendship of Turpin. When Ralston's mother (then Mrs. Bozeman) made her she will, felt it proper to voluntarily say to Turpin that the reason she did not leave him any property in her will was because "Jimmy" would do so in his. (See Record, page 206.) As early as the winter of 1868, when he was twenty years of age, he had formed and announced his determination to give all or a large part of his property to Turpin.

H. R. Brown, who roomed with him that winter, testifies (Record, pages 153, 154 and 155) that he heard him say so half a dozen times that winter; and that he continued to hear him speak of it as late as 1872, mentioning a particular time at that date when he did so to him in New York. Again he heard him speak of it when the mortgage was made on the Cherry street stores, which was years afterward.

A. J. Orr testifies (Record, page 143) that when Ralston became of age and his property was turned over to him by Turpin, Ralston said to him (Orr,) that he intended to give Turpin his property at his death, and that he heard him say so more than once.

W. A. Wylie testified (Record, page 162) to having heard Ralston say that what property he had at his death he was going to give to Turpin.

Jas. W. Hines testified (Record, page 163) that Ralston said to him "If George Turpin should outlive me and I die first I intend to remember his family."

Alex. Block testified (Record, page 168,) "I have often heard him (Ralston) say that if he should die before Mr. Turpin he intended to leave everything to him. That was before he married. He told me that often."

Thomas L. Massenburg testified (Record, page 193,) that he had heard Ralston say several times that George Turpin's children were to inherit his property, "excepting Horne, his son-in-law, whom Ralston disliked."

Henry Horne testified (Record, page 202,) that Ralston stated to him once or twice that he intended to leave his property, or a portion of it, to Turpin's children. He testified that he heard Ralston's intention mentioned by other persons and even by parties on the treets.

All of these witnesses give substantially the same statement of the reasons assigned by Ralston why he intended to give this property to Turpin and his family. They were that Turpin had been the best friend he had ever had; that he had been a father to him; had managed his business for him well, &c., &c. The frequency of these avowals of his intention and their uniformity through so many years, show that this fixed intention was the creature of his own will, and that it was not due to the influence of any other. And more particularly it

should be noted that there is no evidence of any word spoken or act done by Turpin to influence this intention on the part of Ralston.

The perfect corroboration of this mass of oral testimony has been left by Ralston in several instruments in writing, executed by him at various times in the most solemn form.

On the 11th day of May, 1874, the year after his mother's death, Ralston formally made and published his will. The one half of his property he bequeathed to Turpin in trust for Mrs. Laura R. Smith and her children. The other half he bequeathed to Turpin in trust for himself and his children. In that will occurs the following: "And I request that my friend George B. Turpin and his children after him will see to it that my monument and grave shall always during their lives be suitably kept and cared for."

On the 15th day of December, 1879, five years and a half after the date of the former will, Ralston made another will in New York, by which he gave to George B. Turpin, as trustee for his children, (excluding one) the particular property mentioned in the will. This property thus specified is proven by Henry Horne (page 202) and by Alex Block (page 200) to be worth about one half as much as the whole of Ralston's property, excluding the mansion house which was worth $20,000 dollars additional. So that the purpose of the will of 1874 to give to Turpin's family one half of his estate is substantially maintained in the will of 1879.

In the deed of August 26th, 1880, (page 218) and in the deed of August 28th, 1880, and in the deed of April 19th, 1881, the same property is conveyed to Turpin, trustee, which had been bequeathed to him as trustee for his children in the will of 1879.

Confining the enquiry for the present to Ralston's repeated avowals of intention and to the execution of the two wills of 1874 and 1879, all the testimony points to the well defined purpose therein expressed, as one which had originated with himself, and which was so firmly fixed that no change of circumstances or lapse of time could in any manner change it. If he ever consulted with anyone on the subject, it was with his mother, from whom Turpin first learned of his intention. What he said to others about the matter was always a straight out, unqualified avowal of intention. There was never any expression of any hesitancy by him either as to the propriety or certainty of his intention. There is not only no evidence that the frequent and long continued avowals of this intention, were in any manner due to influence or suggestion of Turpin or of any one else, but there is no attempt

to produce such evidence. It must therefore be accepted as an uncontroverted fact that these oft repeated avowals were voluntarily made and were the expression of his own free will.

As to the will made by Ralston in 1874, there is likewise an utter absence of the least evidence showing or tending to show that there was any influence or suggestion by Turpin or any one else to induce him to make it. Relative to this, Turpin testifies (page 206) "I did not know that James A. Ralston was going to make the will of 1874, which has been testified about. I did not suggest to Mr. Ralston, or ask him, or intimate to him to make that will, or any other for the benefit of myself or children. The will was freely and voluntarily made without any suggestion on my part."

The evidence of the absence of any agency on the part of Turpin, in influencing or procuring the will of 1879, is still stronger than that relative to the will of 1874. In addition to the want of any testimony of any such act on the part of Turpin, and besides his denial in his testimony, there was the utter want of any inducement to Turpin, to wish to have that will made. The will of 1874 was still in existence and gave to him as trustee for himself and children, the one half of all of Ralston's property of every description. The deed of 1879, specified property as bequeathed to Turpin, trustee, which was about twenty thousand dollars less than half the property then owned by Ralston, if the Mansion house were included in the estimate, and about half the property if the Mansion house were not included in the estimate. The will of 1874, bequeathed one half of Ralston's property to Turpin as trustee for himself and all of his children; whereas the will of 1879, excluded from its benefits Turpin's oldest daughter, for whom he testifies (page 207) he had the same degree of affection as he had for his other children. This will was executed in New York, when Turpin was a thousand miles away. The directions to have it drafted and what it should contain were given by Ralston in person, and in the presence of the complainant who was then living with him as his mistress. (See testimony of J. M. Ogden, Record, page 216). The will was drafted in exact accordance with his directions, and was duly executed under circumstances which establish beyond controversy that it was the expression of his own careful and deliberate free will. He invited the witnesses the day before to attest his execution of the will. He directed certain changes in the will, and attached his initials to the changes, (page 204). Mr. Horne's presence to act as a witness doubtless suggested the question which was asked of Ralston,

by his attorney, whether he knew that a party who had an interest in the will could not be a witness, and to which Ralston replied that he knew it. He did not disclose the fact that Horne had no interest in the will, but his answer shows he himself fully appreciated the fact. Horne did not have anything said to him about Ralston before leaving Macon for New York, by either Turpin, or by Ogden (to whom the directions for the will had been given by Ralston) or by Proudfit (who drew the will). He had been in New York two weeks before he met Ralston. (Page 204). He had no knowledge of the character of the paper he was to witness until he reached the place where he was invited to attest its execution. (Page 202). He had no information of the contents of the will when he signed it as a witness (page 204). Horace E. Jones, one of the other attesting witnesses of this will, was examined as a witness for the complainant in this case. The pleadings in the case put in issue the free and voluntary execution of this will as an evidence of Ralston's voluntary purpose to give this identical property to Turpin's children; and yet the witness Jones, who knew Ralston intimately, and at whose place of business the will was executed, was not even asked a question by complainant as to whether the will was freely and voluntarily executed by Ralston.

The answer of the defendants set up as a prominent and controlling fact this long continued purpose on the part of Ralston. The complainant does not charge either in the original bill, or in the amendments thereto, filed subsequently to the date of the answer, that these avowals of his intention or the execution of either of the wills were in any manner due to the influence or suggestion of Turpin, or of any one else.

Upon the proof submitted by the defendants, and in the absence of either allegation or proof to the contrary on the part of the complainant, we may safely rest the conclusion that these avowals of intention, and the execution of these two wills, covering a period of ten years, clearly and indisputably establish the fact of the free and voluntary purpose of Ralston during all those years to give to Turpin's all, or a large portion, of his property after his death.

The Nature of the Personal Relations between Turpin and Ralston.

It is important, in examining into the question of undue influence to ascertain definitely what, under the testimony, were the personal relations between Turpin and Ralston. We ask the present consideration of the Court of the testimony on this subject, leaving for subsequent examination the question of the particular influence alleged to have been exerted by Turpin to procure the execution of the deed sought to be cancelled. The allegations in the bill as to these personal relations are substantially as follows:

1st. That Ralston selected Turpin as his guardian in 1867, when he was seventeen years of age. (Note that at this time Ralston was nineteen years of age, as is shown by the testimony.)

2d. That in 1870, Ralston's mother (then Mrs. Bozeman) made her will, naming therein Turpin as one of the executors; that she died in 1873, and Turpin qualified as sole executor of the will.

3d. That Turpin had influence over Ralston, from the fact that he had been his guardian, and the executor of his mother's will, and from the fact that he had been his business agent and confidential friend after he reached his majority; and that both before and after he reached his majority, he had been on intimately friendly terms with him; on account of all of which it is alleged that Ralston had unbounded confidence in Turpin.

The proof offered by the defendant established beyond question the fact that Turpin had not only been the faithful and unswerving friend of Ralston from his boyhood up, but had also been equally the faithful friend of Ralston's father, and also of his mother.

When Ralston's mother married Dr. Bozeman in 1869, Ralston voluntarily, (without any suggestion on the part of Turpin, or any other person, so far as the Record shows), selected Turpin in writing as his guardian, the law of the State of Georgia, giving him the right, at his age, to select his own guardian. The testimony shows that Turpin was faithful to his trust; that he not only kept correct accounts as guardian, but that he proved himself in every particular to be the true friend of Ralston, endeavoring in every way possible to protect his interests, and to do everything for him personally which

he could have done had he been of his own blood. Their personal relations were those of a young man with one who had been for years the friend of himself and of his father; and Turpin is shown by the evidence to have had the deepest personal interest in his prosperity and safety. Ralston himself is shown repeatedly to have said that Turpin was the best friend he ever had, and that he had been a father to him, that he had preserved his property for him and that, if it had not been for him, he would not have anything. See Record, pages 129, 136, 156, 164, 168, 174. The witnesses show that Ralston's appreciation, and opinion of Turpin's friendship and services were well founded. See testimony of the following witnesses: Wm. H. Ross, (Record, page 141), Jno. E. Jones, (Record, page 147), O. F. Adams, (Record, page 151) H. R. Brown, (Record, page 155). It was shown by these witnesses that Turpin had earnestly striven to protect Ralston's property, and that it was through Turpin's efforts that anything remained to him—that Turpin had continuously endeavored by counsel, advice and remonstrance to turn him from extravagant waste of property and from personal dissolute habits—that not only did he endeavor to influence Ralston personally, but that he induced gamblers to refuse to permit Ralston to play at their tables. Ralston believed, that Turpin had been for thirty years faithful to the friendship and to the interests of himself and his family. That this belief was justified is proven by the witnesses, and with all of his acts during all these years, in this regard, in issue, the most astute and vigilant counsel representing the complainant have been unable to show one act on his part by which he had sought to improperly benefit himself at the expense of the Ralstons, either father, mother or son. On the contrary it was shown (and if it had been untrue the proof could have been readily obtained) that as executor of Ralston's mother's will, he voluntarily omitted and refused to collect three thousand dollars from Ralston, which had been awarded to him by the probate Court as his proper compensation.

In that community, where there had been this long period of intercourse and of service, and where his acts were necessarily known and read of all men, not one witness could be found who could suggest a single instance in which any act of his towards the Ralstons, or in relation to their large property interests which had been in his charge, could be made the subject of censure or cause of criticism. He had practically administered on the estate of Jas. A. Ralston, Sr., valued at between two and three hundred thousand dollars; he had subse-

quently, as the guardian of Jas. A. Ralston, Jr., had the charge and management of his property, valued at over one hundred thousand dollars; and still later, he had been the sole executor of the will of Mrs. Bozeman (Ralston's mother), disposing of property also worth over one hundred thousand dollars. Every act of his relative to the management of these three large estates is necessarily of record in the Probate and Guardians' Court, in the City of Macon, open to the inspection of all; and yet, with every inducement so to do, and with every opportunity for examination, not a single instance was shown in which he had, in any particular, been unfaithful to either of these important trusts.

Such devotion and such fidelity to every relation he had borne them, proven beyond the possibility of successful contradiction, had produced on Ralston the natural and legitimate effect. He loved Turpin as if he were of his own blood. He esteemed him not only as a friend, but as a father. He had confidence in him as a man of integrity and business capacity—the same confidence with which every man of like qualities legitimately inspires those who have had the opportunity to prove them. This affection for Turpin, Ralston not only avowed to his friends and acquaintances, but in the several wills which he executed during a period of more than seven years he showed that it had suffered no diminution.

In the will of 1874 Ralston gave to Turpin, as trustee, one-half of his property; and in it, passing by all of his relatives, he said: "And I request that my friend, George B. Turpin, and his children after him, will see to it that my monument and grave shall always, during their lives, be suitably kept and cared for." (Record, page 228).

In the will of 1879 Ralston again gave to Turpin, as trustee, property amounting to about one-half of his estate; and in it there occurs the following: "I give and bequeath unto my grandmother, Mrs. Mary Ann Lamar, all of the family pictures of which I die seized and possessed, for and during her natural life, and at her death, to my friend, George B. Turpin, of Macon, Ga., having enjoyed his friendship for a long course of years. I feel that they will be safe and kept intact in his hands." (Record, page 230).

In each of the foregoing wills, Turpin is named as executor. In the will executed in favor of the complainant, October 21st, 1881, he nominates and appoints as executors "his friends, George B. Turpin and Thomas L. Massenburg," and provides that they shall not be

required to give any bond, and dispenses with the requirement that they shall make any inventory and returns of the property to the Court.

It is important to note that this esteem and confidence were entirely voluntary on the part of Ralston. The complainant alleges in her bill that Turpin "ingratiated" himself in the favor of Ralston. Even this allegation is unaccompanied in the bill by any allegation that he thus ingratiated himself by any artful practice, or by any misrepresentation of any kind, or with the design thereby to secure Ralston's confidence, or for the purpose of securing and maintaining the control of his property with the view of ultimately obtaining a portion of it. Even, however, if it be assumed that such is the intended meaning of the allegation in the bill, it is entirely unsupported by any evidence. All the witnesses in Macon testified to the conduct of Turpin during a long series of years, which richly merited such esteem and confidence, but not one testified to a single word spoken or act done by him which could be tortured into an attempt or wish to designedly ingratiate himself into the favor of Ralston for any purpose, and more particularly for the purpose of acquiring an undue influence over him.

The only testimony which can be construed into evidence of such a design is that of the complainant herself, where, on page 97 of the transcript, she speaks of Turpin as representing to Ralston "that he, Turpin, had kept all his money for him, and would have to support him, anyhow. He wanted to make him believe that only for him, he would be without means — not have a dollar." This testimony was given by her several months after the evidence had been taken of William H. Ross and numerous other witnesses, in which they testified that Ralston had said to them that Turpin had saved his property for him; and after John E. Jones had testified "that he (Ralston) wouldn't have had a dollar, if it had not been for George Turpin." It therefore became important to the complainant's case to represent Turpin of being in the habit of talking to Ralston as she represents. But if this were true, there were certainly persons in Macon who knew it, also. There were hundreds of people in Macon who for years had been in intimate and daily association with both Ralston and Turpin; and if there had been any such habit of Turpin towards Ralston, surely somebody would have known of it. And yet, not a single witness was produced to prove it. Not only so, but a number of Macon witnesses were examined before a Court Exam-

iner, with the learned counsel of the complainant present to ply each one with every question which could possibly aid their client's cause. There were Alex. Proudfit, William H. Ross, John E. Jones, J. M. Ogden, Thomas L. Massenburg, Solomon Waxelbaum, A. J. Orr, Alex. Block, Henry Horne, and others introduced as witnesses by the defendant; and W. D. Palmer, R. W. Cubbedge, Hayne Ellis, Mrs. Hayne Ellis, M. R. Freeman, and others introduced as witnesses for the complainant. These were all citizens of Macon, intimately acquainted with Ralston and with Turpin, and not one of them testifies to any such habitual or isolated speech of this kind addressed by Turpin to Ralston, or to any other word or act on the part of Turpin which can be construed into an attempt or wish on the part of Turpin to ingratiate himself into the favor of Ralston with the view to acquire an undue influence over him, or for any other improper purpose. Moreover, none of these witnesses were asked, by the learned counsel for the complainant, any questions attempting to elicit such proof. Turpin, when on the witness stand, was asked as to whether the statement of Mrs. Ralston in her testimony was true, to the effect that he had told Ralston "that he (Turpin) had kept all his money for him, and would have to support him, anyhow; that he (Turpin) wanted to make Ralston believe that only for him, he would be without means," &c. He replied (on page 212 of the transcript) as follows: "I have cautioned Jimmie, and told him that unless he took care of his property, somebody would have to take care of him; I may have said I would have to do it." The Court will note the difference between the testimony, on this point, of the complainant and that of Turpin. The testimony of the complainant is designed to show that Turpin endeavored to impress continually upon Ralston the conviction that he was in a state of dependence upon him, (Turpin), and that he (Turpin) was all that stood between him and beggary, &c. That which is testified to by Turpin as having been said by him to Ralston, so far from being an attempt to produce on Ralston's mind an impression of obligation to and dependency upon him, (Turpin), was in truth an appeal to him to so act as to maintain his independence, and a warning to him that if he (Ralston) did not himself take care of his property, he would become dependent.

The evidence in the case demonstrates that the esteem and confidence entertained by Ralston for Turpin were voluntary on the part of Ralston, and were the legitimate and proper fruit which had been produced in the mind of Ralston by the acts of Turpin,

which showed him to be loyal to the interests, of himself and family, and also that he was a man of capacity and integrity.

The complainant takes eagerly hold of the fact of this esteem and confidence as the basis of the argument to prove that the deeds are invalid. The defendants say that this esteem and confidence were such as every true man is justified in the wish to inspire, through his integrity and capacity, in the breast of others. At a later point in this argument we shall endeavor to show that such esteem and confidence so far from being a barrier to the bestowal of one's bounty, gives to such bestowal the highest sanction of reason and judicial authority. At this stage of the argument the purpose is to show definitely, by a review of the testimony, what were the personal relations between Turpin and Ralston, in order that the question of law relative thereto, may be the more readily discussed.

The Nature of the Business Relations Between Turpin and Ralston.

With the same view as that expressed in the conclusion of the foregoing paragraph, we will endeavor at this point to show definitely what under the testimony were the business relations of Turpin and Ralston.

It is sought to be established by the complainant that at the time of the execution of the several deeds to Turpin, trustee, Turpin occupied towards Ralston a confidential business relation—that this confidential business relation had continued uninterruptedly from the date of Ralston's majority to the date of the execution of the last deed when he was thirty-two years of age—and that having been the guardian of the person and the property of Ralston during his minority, the same relation of confidence and control continued during the eleven years succeeding the date of his majority. The record shows that Ralston's estate consisted almost exclusively of real estate and the income from it, the same being business houses and the family mansion house in the City of Macon. On pages 269, 270 and 271 of the transcript will be found the list of the property turned over by Turpin, guardian, to his ward Ralston, when he reached his majority in February 1869. Besides the real estate, the property consisted of about $4,500 in money, $5,000 in Macon City bonds, and about $15,000 in promissory notes. Most of the latter were rent notes not then due. Ralston continued to keep his personal effects at the office of Turpin & Ogden, as a place of convenient and safe deposit, but there is no evidence that Turpin after that date had any control over his personal property or was his agent relative thereto. His firm was constituted by Ralston as his real estate agents, and as a part of such agency of course the undue rent notes were in the hands of the firm for collection.

The witnesses testify generally that Turpin had the management of all of Ralston's business. He had no business other than the management of his real estate, which consisted in renting out the property to suitable tenants and collecting the rent when due, attending to necessary repairs and to the matters of taxes and insurance on the property. All these things were within the usual duty of a real

estate agent, relative to property in his charge as such, and were attended to by Turpin as Ralston's real estate agent. When Wm. H. Ross was being cross-examined on the stand by complainant's counsel, the following testimony was elicited. (Page 143:)

Question—He committed his whole business matters to Turpin's management?

Answer—They discussed things, and I think Turpin carried out Ralston's ideas. I don't know that he did in every case, but I think they consulted, and he deferred to Turpin's opinion. I don't know of anything they had to do except collect the rents.

Question—Pay bills, and pay over the money to him?

Answer—Yes; he collected rents and kept his accounts, (Turpin did so.) There were a good many bills that he would have to endorse that Turpin paid.

There was no business connected with the income from the estate. There were no investments to be made, for the Record shows that Ralston spent all of his income as fast as it was received, and that he even anticipated it and spent more than his income, so that his properyt diminished and never at any time increased after he became of age. It follows, that however fully it is testified that Turpin had charge of all of Ralston's business, the proof shows that that related solely to the management of his real estate as above stated. It is not pretended that Turpin had any control over the disbursement of his money by Ralston. On the contrary, the proof is abundant, by witnesses both for the complainant and defendants, that Turpin was during many years constantly endeavoring, without success, to keep Ralston from squandering his money. It cannot be said that Turpin had any control over Ralston's money, or any right to pay it out except by Ralston's order; for it is shown by the witnesses, both for the complainant and the defendants, that when accounts against Ralston were presented to Turpin for payment, he would refuse to pay the same without the approval of Ralston. (See testimony of following witnesses: William H. Ross, page 143; Dr. William F. Holt, Record, page 177; Warren Johns, page 193; Thomas L. Massenburg, page 194; S. Waxelbaum, page 199.)

There is no evidence that Turpin ever undertook to invest or pay out a dollar of Ralston's money without his express order, excepting such amounts as his position as real estate agent authorized him to pay for repairs, taxes, insurance, &c., on the property. The business relation between them then is thus shown by the testimony to have

been that of the owner of a large real estate incity property and the real estate agent engaged in the care and management of that property to the extent of renting it out, collecting the rents and paying them over to the owner, and attending to the repairs, taxes and insurance on the property. Turpin testifies (page 206), that after he settled with Ralston as guardian, and turned his property over to him, Ralston employed his firm "to rent out and look after the property."

The evidence further shows that, as such real estate agent for Ralston, Turpin occupied exactly the same relation to him that he did to all other real estate owners for whom he was the agent.

W. D. Palmer, one of the principal witnesses for the complainant, who had his office in the same building with Turpin, testified as follows: (See Record, page 186).

"Question—Do you know whether or not Ralston paid any attention to that business while it was in Mr. Turpin's charge?

"Answer—I do not know; I suppose he did.

"Question—To what extent?

"Answer—Well, I don't know to what extent; I suppose he gave it the same attention that any other man would give his business."

Alex. Block, the book-keeper of Turpin & Ogden, testified as follows: (Pages 168 and 169).

"Question—What did Mr. Ralston do with reference to looking after his business and accounts?

"Answer—He got regular statements, just the same as the balance of our customers did. He knew what was going on just as well as any other property owners we have—Mrs. Damour, Mr. Gunn, and Mr. Dempsey.

"Question—Regular statements were furnished him during that whole time?

"Answer—Yes, as long as I have been there, and that is between thirteen and fourteen years.

"Question—I will get you to state whether Mr. Ralston would look over the books himself.

"Answer—He would look at the books some times but it wasn't necessary, for he got statements which were perfect copies of the books. When he was in New York, we would send him statements quarterly. He knew how much money he had there and how much money he owed us.

"Question—I will get you to state whether he knew all the property he had and what each particular piece was rented for?

"Answer—Yes, I think so.

"Question—Not what you think.

"Answer—I know he did. He knew what his income was for he got statements of it. He knew exactly what it was.

"Question—I will get you to state what difference there was between the management of his business and any other customer of Turpin & Ogden.

"None at all.

"Question—What difference, if any, was there in reference to the charges for attending to the business?

"Answer—Well, Mr. Ralston was a big customer of ours and we charged him a little less than we did some of the others.

"Question—What do you say with reference to his carefulness and particularity in looking after his business. Was he more particular than others or less particular?

"Answer—I don't think he was any more particular than others, but he always knew what was coming to him, and wanted it. He wasn't any more particular than any body else. I don't say he was as particular as some we had, but he was as particular as an ordinary man."

Chas. E. Damour (whose mother's real estate was also in the hands of Turpin & Ogden as real estate agents, see Record, page 168) testified: (Page 195.)

"I have seen statements referred to him by Mr. Block, in the office of Turpin & Ogden, and think I have heard him call for a statement of his accounts: have seen him looking over statements—one statement in particular."

Henry Horne testified on pages 201 to 205. He married the daughter of Turpin who is excluded from the benefits of the will of 1879, and of each of the deeds to Turpin, trustee. Seven years prior to 1880, he was a clerk in the real estate office of Turpin & Ogden. He has ever since 1880, been himself a real estate agent in Macon, on his own account. He says (beginning near bottom of page 202:)

"Mr. Turpin treated Mr. Ralston with no more courtesy than he would any other customer. I never saw anything peculiar in their business intercourse. Turpin treated Ralston as he would any other customer, managing the business for the best interest of Ralston. I never saw Mr. Turpin make any effort to keep Mr. Ralston's busi-

ness. I heard Mr. Turpin one day tell Mr. Ralston that if he did not like the way he was managing his, Ralston's, business he could take it some where else."

This language of Turpin is not that of one who is endeavoring by a smooth tongue and flattering speech to maintain dominion and control of the property of his employer, with the design by improper influences to secure it for himself. The testimony is important as truly illustrating the frank, independent character of the man. It is still more important as showing that Ralston did not blindly leave to Turpin the management of his real estate business, but that he was himself looking into it to the extent that he was finding fault with Turpin's management.

Wm. H. Ross testified (Record, page 139) as follows:

"I have heard of his disputing bills; he said they were not just; that he wanted corrections, &c. That was only an evidence that he was looking after his own business."

A. J. Orr, who was a clerk for Turpin & Ogden in 1869, when Ralston came of age, testified as to the relation between Turpin and Ralston immediately before and after the date of the latter's majority; he said (Record, p. 145) that Turpin managed Ralston's business for him exclusively; the explanation is found in the additional testimony of the same witness, (page 146) where he said that Ralston "said his property was just as well managed as he would have it managed." This shows that Ralston was attentive to his interests, that he was watching the management of Turpin, and that he was willing and wished for Turpin to have the entire management of his real estate, because that management was as good as he would have it.

H. R. Brown testified as follows: (Page 159).

"Question—He (Ralston) didn't give Mr. Turpin a great deal of trouble about the management of his property?

"Answer—I think he did.

"Question—He didn't interfere with him?

"Answer—Yes: I think he did: I think he wanted to have his own way about it."

Ralston's correspondence with Turpin, beginning on page of the transcript 274 and extending to page 283, shows that he was interested in the business in Turpin's charge in Macon, and that he was giving careful attention to the details of the same, and that Turpin was consulting him about the business and taking his directions.

The letter of June 29th, 1880 (page 274) is as follows:

"*Dear Mr. Turpin* — Your letter of 25th received. In reference to back house and roofs, borrow as much money as you want, on dwelling on hill, to fix up all as you wish it fixed. Get sufficient to make all necessary repairs on all stores, if you can. I hope Huff will pay the $150.00. Your friend, JAS. A. RALSTON."

This letter shows that Turpin had written to Ralston reporting the necessity for certain repairs, and the want of money to make them with; that Ralston recognized the necessity for such repairs, and directed the money to be borrowed by giving the house on the hill as security; and he further directs, that while money is being borrowed for one purpose, enough be also borrowed to make all necessary repairs on the stores.

The letter of March 9th, 1881, is a long letter, filled with a discussion of several important matters relative to his Macon business; among others, authorizing the sale of the dwelling-house by Turpin, "if you can dispose of property at my price, twenty thousand dollars."

The letter of March 29th, 1881, calls attention of Turpin to the fact that he had in a previous letter asked for a statement of his account, which had not been received; also, alluding to efforts to sell the dwelling-house, expresses the hope that the parties have not backed out.

The telegram of April 9th, 1881, relates to the sale of the dwelling-house for twenty thousand dollars. The amount agreed upon as the purchase money had evidently been reported to him for his approval. Ralston telegraphs, "Sale satisfactory," and directs Turpin to come on, at his expense, to fix up titles.

The letter of April 20th, 1881, discusses important matters relative to his Macon business, in view of threatened suits against him, and directing Turpin what to do and what not to do.

The letter of May 6th, 1881, refers to a letter received from Turpin, in which he had evidently given him his views relative to Mrs. Smith's suit against him. He has considered what Turpin has said, authorizes him to arrange terms with Mrs. Smith if he can do so, and asks Turpin to come on North in order that he (Ralston) may have a long talk with him about his business.

The letter of September 12th, 1881, was addressed to Alex. Block, clerk for Turpin & Ogden, asking him to send on a statement of his account.

The letter to Turpin of October 27th, 1881, (page 282) mentions that in a previous letter he had sent a receipt for ten thousand dollars, and in the same letter had sent for statements of his account—not having received it he asks again that the statement of his account be sent.

The letter to Turpin of November 11th, 1881, gives directions as to several matters connected with his Macon business. He directs that the payment of his taxes be postponed until the January rents come in and that the balance due him be sent on to him. Demands that Ogden pay him $100, which he says was due him at the time that he (Ralston) paid Ogden $1,000. Calls for statement of his account from Block, the clerk of Turpin & Ogden. He expresses gratification that Turpin will thereafter keep a separate account of Ralston's Hall, (a theatre), for the reason that he can then better understand how much it will cost for repairs, and what rents are taken in.

This testimony of the witnesses, and particularly the contents of these letters, demonstrate that Turpin, as the real estate agent of Ralston, occupied precisely the same business relation to him that he did to all other persons whom he also represented as a real estate agent. Ralston required and received regular statements of his accounts in order that he might judge for himself whether the business was being managed in a way that he would approve. He gave directions as to the details of his business, and Turpin reported to him and asked his approval relative to matters of an unusual character. He authorizes the borrowing of money for the repairs needed on the property and designates the security which shall be given for the same. He is consulted as to placing new chairs in the theatre, and before determining the question asks to know what the cost will be; and wishes that the Hall account shall be kept separate, &c. These are not the acts of one who had surrendered absolutely to another the control and management of his property; but they indicate clearly the interest and attention of one who looked after his own affairs and watched to see that his business was properly managed by his agents. There is nothing in all of the testimony which establishes any confidential business relation between Turpin and Ralston. The general statement of the witnesses that Ralston gave the entire management and control of all his business to Turpin must be construed in connection with the proven and indisputable facts as to the character of the business committed to Turpin by Ralston, and as to the extent of the agency and the degree with which Ralston still maintained a supervision over it. It cannot

be maintained that Turpin was in possession of Ralston's property after he reached his majority. As already shown the only property with the management of which Turpin was intrusted was real estate, and of this Ralston was as much in possession, under the law, as he was of the watch in his pocket. Over the revenue collected from it Turpin had no control whatever, and the only thing done with it outside of the payment of the necessary expenses of the property, was to pay it over to Ralston. There is no evidence, and there can be none, that Turpin ever withheld from him a dollar when he demanded it and when it was in hand to pay over. On the contrary it is shown that Ralston was constantly in advance of his income. It was sought to be shown that when he made a loan of five thousand dollars Turpin attended to it for him. But on the contrary W. H. Ross testified, (page 138) "when I loaned the money, he (meaning Ralston) said that Mr. Turpin would see it paid."

Ralston's Strength of Will.

In considering the question of the undue influence which is alleged to have controlled the act of Ralston, it is a material inquiry whether he was a man, of little or no will power. This is the allegation in the bill, and it is sought to be so proven by the testimony. We will endeavor to test this question both by the opinions of witnesses who knew him and also by his own acts and conduct.

W. H. Ross testified as follows on page 141 in answer to question by defendant's counsel:

"Question—I will get you to state in general terms whether or not James Ralston was a man who could be easily influenced, or whether he was a man of a decided will of his own.

"Answer—I don't think he could be influenced. That was what was in the way—he could not be influenced."

The counsel for complainant thereupon (page 142) propounded to the witness the following question:

"Question—You mean influenced about such things as drinking or things he wanted to do to gratify his taste or passions, or anything of that sort? To what extent do you mean to say that?"

To which Mr. Ross replied:

"Answer—I don't know to what extent, but I know he was a man of very strong will. When he wanted to do a thing he would go along and do it."

A. J. Orr, clerk for Turpin & Ogden testified as follows: (Page 146).

"Question—I will get you to state whether or not Ralston was a man who could be easily influenced or whether he was a man of his own head, and had a strong will.

"Answer—I think he was of pretty strong will, from what little connection I had with him."

O. F. Adams testified page 153. "I think he (meaning Ralston) had a very strong will of his own. If he liked anybody, trusted anybody, I think they could influence him.

"Question—In what way; for his own good?

"Answer—Yes; for his own good. I have never heard of anybody having any influence over him to do anything wrong.

"Question—You state that he was an independent man?

"Answer—I think he was; I have always thought he was very positive and emphatic about anything. I never could do anything with him. If he liked anybody, I think he would be accommodating; not to any injury to himself though, I don't think. If he didn't like anybody he wouldn't even treat them or give them a cigar or anything. He was prejudiced like his father."

H. R. Brown, who was Ralston's room-mate for one whole winter, (where, in the language of the witness, they "roomed together, slept together, and ate together,") testified, (on page 156):

"He (meaning Ralston) was as stubborn as a mule when you come to talk to him on anything he had his mind on. Sometimes I would try to get him to do certain things, and he would fall right into it and do it, and sometimes, again, he would not move a peg."

"Question—I will get you to state whether he was easily persuaded, or whether he was an independent man and a man of strong will?

"Answer—I think he was very hard to influence; I don't know that I ever met a young man that was so little influenced as he was; he was rather bigoted—if I may use the word—more so than most any young man you will find; he thought he knew a great deal more than he did.

"Question—You say he had a will of his own in everything?

"Answer—Yes, and a very strong one."

J. W. Hines testified: (Page 164). "I think he (meaning Ralston) had a strong will of his own; I don't think a person would get anything out of him unless he wanted to give it to them."

Dr. Wm. F. Holt, his physician, testified as follows: (Page 176).

"Question—Was he a man easily influenced, or a man that had a will of his own?

"Answer—He was a man of very irascible temperament.

"Question—What would you say of his being easily influenced, or of having a stubborn will?

"Answer—It depends on the condition he was in; if he was drinking, sometimes he was very stubborn."

Thos. L. Massenburg testified: (Page 194). "Ralston was at times rather headstrong—was not easily persuaded to do what he did not want to do; had a head of his own."

Henry Horne testified: (Page 203).

"Mr. Ralston was pretty hard-headed—I mean by that, strong-minded—a man you could not twist or turn to suit you.

"Question—Was Mr. Ralston a man easily influenced to do a thing he did not want to do?

"Answer—No.

"Question—Mr. Horne, I want you to give your opinion from your acquaintance with Mr. Ralston as to the character of his mind in relation to his being easily influenced in any matter against his inclination.

"Answer—I do not think he was a person who could be influenced against his inclination."

Every Macon witness who testified on the subject of the character of Ralston's mind and habit relative to his strength of will, gave evidence substantially to the same effect that he was a man of strong will and not easily influenced against his inclination. A number of the Macon witnesses were not asked any questions on this subject; none of the Macon witnesses who were introduced by complainant were asked any question on this subject. But no single Macon witness who was produced by either complainant or defendant testified that he was a man of weak will and easily influenced by others.

We are not at present engaged in an examination of the question of Ralston's susceptibility to the personal influence of Turpin—that will be considered separately. The present inquiry relates solely to the question generally of Ralston's strength of will. The complainant's attempt to prove him a man of little or no will power and easily susceptible to the influence of others is limited exclusively to the production of the opinion of witnesses in Connecticut and New York, who were almost entire strangers to him.

The first witness examined on this subject was J. H. Olmstead of Stamford, Conn., see transcript page 73. His testimony has already been fully discussed. (See pages 20, 21 and 22, of this brief) and the Court is referred to that examination of his testimony without repeating here any more of the same than the conclusion there expressed; first, that the testimony is incredible in itself; and second that if true, it relates solely to his mental condition while either extremely drunk, or before he had rallied from the effects of extreme drunkenness.

Sarah A. Hubbard, Henry A. Hubbard, Patrick McCarthy and Dr. Hurlbutt, all of Stamford Connecticut, all testify more or less directly that Ralston was a man of weak will. In the discussion of the question of "RALSTON'S MENTAL CAPACITY," the testimony of all these witnesses on this point has already been discussed. (See pages

22, 23 and 24, of this brief.) The Court is respectfully referred to that portion of the brief in this connection, and what is there said will not be repeated here.

John O. Brintuall, Dr. W. Gill Wylie (who testified that he only "saw him when he needed a doctor"), Dr. Wm. R. Pryor (who never saw him until December, 1882) and John Sheeran, all of New York City, testify that he was easily influenced, etc. This is an indirect assertion that he was a man of weak will-power. Accepting it as such, we again call the attention of the court to the remarkable identity of language used by these four witnesses in testimony given by each of them on different dates and in the absence of each other. They were all examined upon written interrogatories, by the same commissioners.

Brintnall testifies: (page 109) "He was easily influenced by those he regarded as his friends, and especially by those who may have placed him, as he supposed or was led to believe, under personal obligations."

Dr. Wylie testifies: (page 112.) "He was easily influenced by those he regarded as his friends, and especially those to whom he supposed he was under obligations."

Dr. Wm. R. Pryor testifies: (page 114.) "He would be easily influenced by those he regarded as his friends, and especially by those he believed had put him under special obligations."

John Sheeran testifies: (page 118.) "He was easily influenced by those whom he regarded as his friends, and more so by those whom he supposed had placed him under personal obligations."

There are in these several depositions other equally remarkable instances of identity of language and phrases which prove conclusively that, (as previously noted in this brief as to another similar instance in the case of the Connecticut witnesses) the answers were not written down in the language of the witnesses, but in the language of the commissioners. In testimony, the particular words used by the witness are extremely important to elucidate the exact meaning of the witness, and it is evident in this instance, that wherever the testimony of these witnesses came from the words, in which it is expressed came from the commissioners, and not from the witnesses.

Horace E. Jones, another witness for the complainant in New York, testifies, (page 116) that he "thought he could be easily influenced by those he regarded as his friends." In answer to the first cross interrogatory, however, he says that he never saw Turpin or anyone

else influence him—that furthermore he (the witness who testifies that Ralston regarded him as his friend) was unable to influence him—that he himself tried unsuccessfully to influence him to stop drinking, and also to keep him from buying a pair of horses on one occasion.

Sister Margaret was also a witness examined on the part of the complainant in New York City. In her patient and unselfish ministrations to him, extending at intervals through three years, she had the best of opportunities of becoming accurately informed as to his mental peculiarities. Her words throughout her testimony are evidently weighed with great care. She says, (page 110,) "I don't think he was easilyinfluenced."

With the exception of the testimony of the complainant on this point, (which will be considered later), this is the substance of the testimony of all the witnesses, on both sides, on the question of Ralston's strength of will. The witnesses produced by the defendant were all of them citizens of Macon, who had known Ralston from childhood, and who had had the very best opportunity to know and to judge of his mental characteristics. They were examined orally, with the amplest opportunity for cross-examination by complainant's counsel. On the other hand, the complainant produced not a single witness in Macon to testify that Ralston was a man of weak will and easily influenced by others. Recourse is had to the evidence of strangers to him, who knew little or nothing about him, who were examined by Commissioners on written interrogatories, in the absence of counsel, and whose testimony is produced in the Court in stereotyped phrases, each witness to a large extent being represented by the Commissioners as using the identical language used by the others. It is no sufficient answer to reply that the complainant's testimony was properly limited to those witnesses who were in association with him at the time nearest the date of the execution of the deeds. In the first place the defendants' witnesses, with one or two exceptions, who testified as to his strength of will, knew him not only in Macon from his childhood, but frequently saw him after he went to New York; and secondly, if it could have been shown by any witnesses who had known him in Macon, that he was a man of a weak will, easily influenced, the proof of that fact would have greatly strengthened the testimony of the Connecticut and New York witnesses to the effect that he was "then easily influenced." Furthermore, it is to be noted as extremely pertinent, that these witnesses who testify that he was "easily influenced" are unable to cite a single instance in which

he was ever known by them to have been influenced by any one to do anything he did not wish to do, or not to do anything he wished to do; and when they are pressed to cite any such instance, admit that they are unable to do so. On the contrary, the testimony not only of the witnesses for the complainant, but also of the witnesses for the defendant, shows numerous instances where the most earnest and long-continued efforts of devoted friends were ineffectual to influence him, not only as to ordinary matters, but as to the gravest matters, which concerned his fortune, his reputation, his honor and his very life.

The complainant, in her testimony, says Ralston was easily influenced, &c. The same commissioners who took by commission the testimony of Brintnall, Wylie, Pryor and Sheeran, also took by commission the testimony of the complainant, and the remarkable fact again appears that she uses the identical phrase, with the change of no material word, which the commissioners wrote down as the testimony of the other four witnesses. On page of the transcript 66 she testifies: "He was easily influenced by those he regarded as his friends, and especially by any person or persons whom he considered had placed him under obligations;" but her testimony shows that he was in continual broil and altercation with herself and others, and that there was no submission of his will to anyone, and she herself in order to coerce his will into submission of her own, had to resort to physical force to control him.

No stronger evidence could be given of the strength of his will than the proof of the tenacity with which, through thirteen years, he clung to his purpose to give a large part of his property for the enjoyment of Turpin's family after his death. The resolution was formed and expressed when he was nineteen years old, and no lapse of time or change of condition, circumstance or place, could work any change of his intention. He told it to everyone, and it was the common talk of the streets. He wrote it in his wills and in his deeds, and this record is perfectly and absolutely destitute of the slightest evidence that in all that term of years which closed with his life, there was ever a word spoken or an act done, indicating the least change of this long-cherished intention, or even a suggestion of any possible hesitation as to the final execution of his purpose.

The evidence presents two occasions when this intention, on his part, met with the opposition of others, and the proof concerning it comes in each instance from the complainant herself. She states

inferentially that she refused to sign the second deed, meaning the deed of April, 1881, and she testifies that "he told me that if I did not sign it I would not be his wife any longer than five hours." The complainant is certainly bound by this testimony, and no stronger evidence could be given of the strength of his purpose and of the strength of his will which could so maintain and enforce that purpose. She shows that she was unwilling to sign the deed and that she only did so because she was thus coerced. If unwilling at the time to sign it she, of course remained dissatisfied, and yet during the succeeding years when, according to her own testimony, he was weak and she controlled him like a child, no change of desire is wrought in him, and even she does not testify to a single expression of regret uttered at any time thereafter that his purpose had taken final shape.

The other instance is given in the letter of the complainant to Turpin of October 10th, 1881. She writes him that Ralston had just had a two hours conversation with his aunt, Mrs. Smith, when the complainant was evidently not present, and about which he was so much gratified that he was anxious that the same should be reported to Turpin. There had evidently been an altercation with Mrs. Smith concerning the conveyance of the property by Ralston to Turpin, trustee. Ralston had evidently justified his course and defied her. She, Mrs. Smith, had become enraged, and the complainant writes of Mrs. Smith, "she prayed, in his presence, that when you or your children passed under the buildings that the bricks would tumble down on you and kill you, and she said she was in that nasty, dirty theatre and had to get out; there was not a decent place to sit down, and that your son was door-keeper. She is a terrible woman. You must look sharp to see there is no loopholes that she can make use of, for she is on the war path." Why should Ralston wish this written to Turpin except that in spite of all the pressure his aunt, Mrs. Smith, could bring to bear on him, and in spite of her rage and threats, his will was strong enough to make him persist in his wish and his purpose; and he wished Turpin warned to be on his guard, for this "terrible woman" was on the war path, and would endanger his interests and those of his family if she could find the opportunity.

The testimony which we have reviewed we respectfully submit, shows that Ralston, so far from being a man of weak will was a man of remarkable strength of will and not not easily influenced.

Turpin's Influence over Ralston.

Having discussed the question as to Ralston's susceptibility to the influence of others generally, we now ask the attention of the Court to a consideration of the testimony relative to the particular influence which Turpin exercised over Ralston. The evidence on this subject has been, to some extent, already considered in the review of the testimony relative to the personal and business relations which existed between Turpin and Ralston. Without repeating what is there said we ask that the Court will consider what has been presented under those two heads in connection with the present enquiry.

The witnesses, both for the complainant and the defendants, testify that Turpin had influence over Ralston. The extent of that influence and the character of the same it is material to ascertain as definitely as possible, in order the more easily to determine the truth of the allegation of undue influence on the part of Turpin.

Wm. H. Ross testified (transcript page, 138) as follows:

Question—Didn't he (Turpin) have a great deal of influence over James Ralston, Jr.? Wasn't James Ralston, Jr., in a peculiar sense subject to Turpin's influence?

Answer—"I suppose he was willing to accept his advice and counsel; I don't know what particular influence he had over him." Again, on page 141, W. H. Ross testifies:

Question—Did you ever know of his making any investment by which Ralston's estate was enlarged?

Answer—No sir. I know that Ralston was always after Turpin for money, and he was always trying to keep him down.

Question—Do you know of any other advice he gave him except to try to check him in his drinking and in his wild habits?

Answer—I have heard him talk to Ralston frequently and speak of his mode of living; that it was wrong; that he ought to take care of his money, and gave him advice just as he would his own son almost, or one who felt deep interest in him.

Again on page 142, W. H. Ross testifies:

"Question—Didn't Turpin exercise an influence over him generally in all his business matters?

"Answer—I suppose in the main he did. I have known of some instances where they did not exactly agree, but in the main I think

he did. I think he deferred to Turpin's opinion and advice and counsel. I think Ralston was a man who didn't want to have anything to disturb him in the least.

"Question—He committed his whole business matters to Turpin's management?

"Answer—They discussed things, and I think Turpin carried out Ralston's ideas. I don't know that he did in every case, but I think they consulted, and he deferred to Turpin's opinion. I don't know of anything they had to do except collect the rents."

In the consideration of the testimony of the witnesses as to Turpin's influence over Ralston in his business matters, it is verymaterial to keep in view what that business was, as of course the testimony has reference to that particular business. This has been heretofore discussed and the Court is referred in this connection to page 56, of this brief on the subject of the nature of the business relations between Turpin and Ralston. The business being limited to the renting out and management of Ralston's business houses, the question to be discussed, and the matters about which in the opinion of the witnesses Turpin would have influence with Ralston, would be simply the renting out of those houses, the collection of the rent money, the kind of repairs which should be put on the houses, &c.

And it will be seen that Turpin's influence, such as it was, was limited to these matters and extended no farther.

A. J. Orr, who was clerk for Turpin & Ogden just before and just after Ralston reached his majority, testified that Ralston confided all his business to Turpin and acquiesced in what he said; and that Turpin had as much influence over him as a father would. The same witness after testifying on page 146, that Ralston was a man of pretty strong will, continued as follows:

"He generally acted independent. While he would of course acquiesce and submit sometimes to the advice and influence or opinions Mr. Turpin might express to him in regard to the management of his property, he was a rather independent boy."

John E. Jones testified: (Page 149).

"Question—Did not he think a great deal of Mr. Turpin?"

"Answer—Yes."

"Question—Mr. Turpin had a great deal of personal influence over him?"

"Answer—I don't know about that. I know he expressed to me a great deal about Mr. Turpin's kindness to him."

O. F. Adams testified, page 151, as to Turpin's efforts to keep Ralston out of scrapes and from gambling, etc., and further, on page 152, in answer to the question on cross-examination, whether Turpin had an "unusual influence" over Ralston, said that he thought Turpin had considerable influence with him.

H. R. Brown, who was Ralston's room-mate, testified, page 156, that he frequently heard Turpin remonstrating with Ralston about his drinking and throwing his money away. The witness adds: "I think he, (Turpin) had some influence, but I don't think he had as much influence as some people thought."

Alex Block (page 167) does not testify to anything directly, as to whether Turpin had influence over Ralston. He does testify to the details of the business of Ralston in Turpin's charge and shows that Turpin had no more control and influence over the management of Ralston's property, than as a real estate agent he had over the property of other persons, who also employed him as a real estate agent. This testimony has already been discussed under another head, (see this brief, page 56,) and we respectfully refer the Court to it without repetition here. The reference is now made to it for the purpose of drawing the conclusion that if Turpin managed Ralston's real estate business "*just the same as he did for others*" whose real estate he had charge of, (see Block's testimony, page 172,) then there is nothing in that business connection from which there can be shown or presumed any personal influence exercised by Turpin over Ralston.

W. D. Palmer, who was one of the principal witnesses on behalf of the complainant, was questioned, and answered as follows as to the character of the influence Turpin had over Ralston. (See page 187).

"Question—I want to know if Mr. Turpin, by reason of his business relations with Mr. Ralston and the management of his affairs whether or not Mr. Turpin had any control *such as a business agen would have over a man on that account?*"

"Answer—Yes, sir; I think so."

"Question—Did you ever hear Mr. Ralston speak in reference to that relationship—that is, how he felt toward Mr. Turpin?"

"Answer—He was always very friendly towards Mr. Turpin, so far as I know.

"Question—Was he more friendly toward Mr. Turpin than toward any man you know of?

"Answer—Well, yes; I suppose he was."

The substance of the above testimony is, that on account of the business relation referred to, Turpin had the same control over Ralston that any other real estate agent would have over any other man whose real estate he had in charge, for the purpose of renting out the same, collecting the rents, attending to the ordinary repairs, &c. The complainant's counsel, then, sought to go further with the witness, to prove a personal influence as the effect of that business relationship; but all that was elicited from the witness at that time was that Ralston "was very friendly towards Turpin," and when further plied with the leading question, whether Ralston was more friendly toward Turpin than toward any other man he knew of, the witness answered, "yes." The examination of the witness, on that subject, was not pressed further by the complainant's counsel at that sitting of the Examiner's Court, although the examination of this witness was then continued at very considerable length on other subjects.

At a subsequent sitting of the Examiner's Court, eight days after that at which the above testimony was given, this same witness was recalled, and was examined exclusively on the subject of Turpin's influence over Ralston. Under the examination of complainant's counsel, he testified strongly to his opinion that Turpin had great personal influence over Ralston. (Page 190 *et seq.*) Of what value his testimony is as a basis for a legal conclusion is shown by his testimony on the cross-examination. (Page 191).

"Question—Can you state any particular case, any particular time or circumstance, when you were present at the time Mr. Turpin exercised any influence over him? If so, state when it was, what was said and what sort of influence.

"Answer—I don't know that I can. I don't remember.

"Question—All that you say about it is just what you think.

"Answer—Just in a general way.

"Question—You cannot state any time, circumstance, place or action, or what he said when he exercised any influence over him?

"Answer—No."

And again on page 192:

"Question—Did you ever know any particular thing that James Ralston wanted to do himself that Mr. Turpin opposed, and which Mr. Ralston was prevailed upon not to do by reason of Mr. Turpin's opposition?

"Answer—No, sir; I don't think I do.

"Question—You don't know any particular circumstance where

James Ralston gave up his own will, and deferred to the will of Mr. Turpin? If so, state when it was?

"Answer—I don't know anything."

It will be noted that this witness although strongly pressed to do so, and after eight days' time for retrospection, is utterly unable to give a reason or state a fact on which to rest his opinion. As an opinion, it is of no value unless sustained and justified by the reasons and facts upon which it is based.

Thos. L. Massenburg testified, page 194, that Turpin did have great influence over Ralston. He adds: "My reasons for thinking so are that he was his father's nearest friend and had been his father's trusted agent in the management of his business, and was also young Ralston's agent in the management of his business." The reasons thus given show, the character of the influence which the witness had in mind. It was the influence which arose from Ralston's knowledge of the services rendered by Turpin to his father and to himself in the management of their real estate, renting it out, attending to ordinary repairs, &c. This knowledge produced in Ralston's mind confidence in Turpin as a man of integrity and business capacity. From this confidence in these particulars, resulted the influence of Turpin over Ralston as to the management of his business within the scope of his agency and authority. Ralston would naturally in consequence defer to the judgment as to the tenants to whom the property should be rented, the prices which should be demanded for the same, the repairs which were required and the person who should be employed to make them, &c., &c. This is as far as the reasons assigned by the witness will support the conclusion of influence, and therefore this is the only influence the witness will be construed to have had in mind.

We respectfully submit that this comment on the testimony of Massenburg is properly applicable to the testimony of all the other witnesses who testify generally to their opinion that Turpin had influence over Ralston. Such testimony in the light of the accompanying evidence cannot be construed to mean a dominating influence, which would control the will of Ralston, and which would substitute Turpin's will for Ralston's will, and thus control Ralston's acts against his free will. Neither Massenburg nor any other witness testifies to any influence of this character, nor does he nor any other witness give any reason or cite any fact upon which the existence of any such dominating influence can be based. When pressed in the examination, the witnesses failed to state any such reason, or to cite a single instance

in which Turpin influenced Ralston to the extent that against his own will or wish, he did, or omitted to do, anything because Turpin wished it. On the contrary they, without exception, say they know of no such instance. This interpretation of the testimony of the witnesses is not only supported thoroughly by the fact last mentioned, but is strengthened by the fact that these same witnesses testify that Ralston was a man of strong will and not easily influenced. In addition to the testimony already cited on this point, Mrs. Hayne Ellis, a witness for the complainant, who was the aunt of Ralston, and with whom he at one time lived, testified, (page 182) as follows:

"Question.—Do you know anything about his confidence in him (Turpin), or Turpin's influence over him? Whom did James Ralston trust to attend to his business matters?

"Answer.—I don't think he really trusted anybody in the world, but I think he had a little more confidence in Mr. Turpin than anybody else. I don't think he had full trust in anybody; it might have been because he was drinking so much."

Not only do the witnesses fail to show any instance of such dominating influence by Turpin over Ralston, and further, expressly disclaim any knowledge of such instance, but the record is full of the evidence given by the witnesses, both for the complainant and the defendants, of the continued and persistent efforts of Turpin for years to influence Ralston in certain matters, and his utter failure in such efforts.

It is shown that for long years he endeavored, by the most earnest persuasion and remonstrance, to keep him from indulging to excess in drink, and that he was utterly unable to influence him in this regard. Not only were these efforts persisted in by Turpin in Ralston's later years, but also early in his life, before the habit had become fastened upon him. He strove to influence him against gambling but failed in this as he had done in the other effort; for the testimony is in the record, (transcript, page 151), that unable thus to influence him, he induced gamblers to deny to Ralston the privilege of playing at their tables.

The evidence is found throughout the record, that Turpin constantly for years used his utmost endeavors to influence Ralston not to waste and throw away his money in dissolute and riotous living. And yet it cannot be shown that he was able, even temporarily, to influence him in this regard; for the evidence is indisputable, that he continued steadily to disregard all of the efforts of Turpin, and that,

in spite of the handsome revenue from his property, he constantly encroached upon the corpus of his estate.

It is proven, that with all the earnestness with which he could be inspired, not only by his regard for Ralston himself, but also by the memory of the sacred obligations he owed Ralston's father and mother, he strove to tear him away from the embraces of "the strange woman," of whom the wisest of men has written, "Her feet go down to death; her steps take hold on hell." But Turpin's attempted influence was as naught to him, and he went forward unheeding to the fate predicted by the same wise man for those who "hated instruction" and "despised reproof."

These were not light matters about which Turpin thus sought, ineffectually, to influence Ralston. As previously said, they concerned his fortune, his reputation, his honor, and his very life. Surely, no stronger demonstration could be made of the fact that Turpin had no power to influence Ralston against his will.

In the face of such proof, and in the utter absence of any evidence of any instance in which he was influenced against his will by Turpin or any one else, what comment is needed on the testimony of witnesses who were strangers to him, and five of whom, testifying at different times and places, but before the same Commissioners, are represented as each saying, one after another, in stereotyped phrase, he was "easily influenced by those he regarded as his friends, and especially those to whom he thought he was under obligations?" Where came their opportunity for information as to how he regarded those to whom he was under obligations? What opportunity was there for the bestowal of favors upon him, and the recognition of obligations therefor by him, when, according to the testimony of these witnesses, they only knew him when he was continuously a disgusting, maudlin drunkard, imbecile therefrom and without the power of will or sensibility?

One of these witnesses, who gave the above stereotyped answer as to Ralston's susceptibility to influence, admitted on the cross-examination as follows: "I don't know that Ralston was led to believe that he was under personal obligations to anybody, or thought so." (See transcript, page 109). Another of complainant's witnesses, who had also given the same stereotyped answer, when pressed on cross-examination, replied: "I cannot answer this, as I know nothing about the subject." (See transcript, page 115.) Still another witness, who also gave the above stereotyped answer, when pressed on

the cross-examination, said: "I don't know who Ralston was led to believe he was under obligations to; I can't tell how he thought he was under obligations; I can't give the names of the persons, places and dates, nor if they ever influenced him to do anything." (See transcript, page 118). And still a fourth witness, who had given the same stereotyped answer, when pressed on the cross-examination, showed that all that he knew about it was entirely hearsay.

We respectfully submit that this unqualified evidence by the witnesses themselves that they have testified to a matter of which they admit they know literally nothing, should not only discredit their testimony as to that particular matter, but that their entire testimony is thereby rendered unworthy of consideration by any Court.

We close this discussion of the question of the character and extent of the personal influence of Turpin over Ralston, with asking the Court to note the fact that all of the witnesses who testify to any effort of Turpin to influence Ralston, say without qualification that all such efforts were to influence him for his good, and not one of them testifies to any effort of Turpin to influence him for a selfish purpose.

T. L. Massenburg testified, page 194:

"Turpin exerted no influence that I know of over Ralston, except for his own good. The influence of Turpin over Ralston was akin to a paternal influence such as I would exert over a son of mine to keep him from doing wrong; *I know of no other.*

To the same effect was the testimony of Wm. H. Ross, Jno. E. Jones, O. F. Adams, H. R. Brown and others. Even the complainant's witnesses testify to the same effect. See testimony of Brintuall, page 109; of Horace E. Jones, page 117.

The Particular Inducement Which Caused Ralston to Execute the Deeds.

Before discussing the principal legal questions pertinent to this case, it is important to examine the evidence on the question, whether the donation to Turpin's children was the voluntary act of Ralston in obedience to a resolution formed by himself a long time previous to the date of the instruments in question, or whether it was an act not the result of his own free will but brought about and induced by the undue influence of Turpin.

An important portion of the argument which is essential to the foregoing enquiry has already been discussed in this brief from page 43 to 47, inclusive, under the head of "RALSTON'S PURPOSE TO GIVE A PORTION OF HIS PROPERTY TO TURPIN'S FAMILY." Without repeating that portion of the argument, the Court is now respectfully referred to the same to establish the propositions, first, that as shown by Ralston's repeated avowals, and by the execution of the will of 1874, and the will of 1879, it had been the indisputable purpose of Ralston from 1869 to 1879, to give to Turpin's family all, or at least one-half, of his estate; second, that this purpose originated in his own breast without any suggestion or agency on the part of Turpin; and third, that during all that time, as well as for the remainder of his life, there was never the expression of a doubt or hesitancy as to his purpose, or the utterance of a hint that he in any manner regretted any act he had done to effectuate it.

If the foregoing propositions have been established as true, they go a long way in proving the conclusion that the final act by which that purpose was effectuated was his own voluntary act, and was not the result of any undue influence exerted over him by another. Previous expressions of intention, both by oral avowals and by written letters and instruments, are held by Lord Brougham, in Hunter *vs.* Atkins (3 Mylne and Keene,) hereinafter quoted somewhat at length, as very high evidences that the final execution of the instrument is the voluntary and deliberate act of the party and that it is not due to the influence of another. Accepting, then, for the present purpose of the argument, that this was the purpose of Ralston up to and including, the time of the making of the will of December, 1879, we

are to determine under the evidence whether there was subsequently any change in his purpose, and whether the deeds subsequently executed were so executed in furtherance and execution of the same intention which he had maintained for so many years.

If Ralston had expressly revoked the will of 1879, without substituting any other means by which he proposed to carry out his original design, that fact would furnish the evidence of a change of intention. His marriage and the consequent revocation of the will of 1879 does not, however, raise a presumption of any change of intention. As Judge Speer says, in his opinion, "it does not appear that Ralston knew this until Turpin informed him of it the ensuing August." So far from this will being a change of his intention towards Turpin's family, the evidence conclusively supports Judge Speer's conclusion, expressed as follows on page 303 of the transcript: "It is impossible that this will should be regarded otherwise than as the evidence of the settled purpose on Ralston's part to provide for Turpin's children, and to also provide for the woman who was soon to bear his name." The will was executed but two weeks before his marriage, and evidently in contemplation of marriage. The only material changes from the will of 1874 were to substitute the complainant in the place of his aunt, Mrs. Smith, to leave out Turpin and his eldest daughter from the number of beneficiaries, and to specify the particular property to go to Turpin, trustee, and that to the complainant. The directions for the drafting of this will were given by Ralston in person to Mr. Ogden, and when he was informed, in the presence of the complainant, that his marriage had revoked the will, he readily and promptly expressed his willingness and desire to execute the deed which would carry out his original design of giving to Turpin's children the enjoyment of this property after his death. And all of his subsequent acts in this regard show that what he said and did on the occasions of the execution of the several deeds, was the truthful expression and execution of his voluntary and long cherished wish and purpose. The complainant, in her sworn bill, alleges that when the matter was brought to his attention by Turpin, Ralston "readily consented to sign said deed of gift." (See transcript, page 4.) In her testimony, she, referring to the execution of the first deed, simply says that Ralston signed the deed. She does not say that he signed it either willingly or unwillingly. It cannot be doubted, however, that he signed it willingly. If other evidence were wanting, her failure to testify to any unwillingness, on his part, to sign the deed, would be sufficient

proof that he did sign it willingly. It cannot be doubted that if the contrary were true she would be eager to show that fact.*

But we are not left to this negative testimony. Ralston not only "readily consented" to the execution of the deed, but he immediately proceeded in person to arrange actively for the execution. He went personally in a carriage from his house to the hotel in Stamford and asked J. M. Ogden to go with him to Bridgeport to have the deed signed, giving to Ogden the reason why it was necessary to go there for that purpose. Not finding the commissioner in Bridgeport, he and the complainant went to New York in company with Turpin where the first deed was signed August 26th, 1880. Mr. Ogden was invited to dine with Ralston and complainant the day they went to Bridgeport together, and was at the commissioner's office in New York the next morning immediately after the deed of August 26th was signed, and there saw all the parties. He testified (transcript, page 217) that he never heard any entreaty or persuasion to induce Ralston or complainant to sign the deed; and that his going with witness was "perfectly voluntary."

Ralston and complainant after the execution of the first deed returned from New York to Stamford. Upon information received that on account of an informality in the first deed it was desired that he should execute a second, Ralston and complainant, by appointment, came alone from Stamford to New York, and on August 28th, 1880, they both joined in the execution of the second deed. The testimony as to what transpired at that time and immediately thereafter is full and complete and stands without even an attempt at contradiction. (See testimony of Alex. Proudfit, beginning on page 128 of the transcript.) Whatever may have been the exact language used by Ralston Mr. Proudfit testifies that Ralston himself asked for the paper which he had advised or written Turpin about—(see transcript, p. 134,) that both he and the complainant read and signed the same—that the reading was carefully done by them, consuming some time—that complainant was fully interrogated by the commissioner as to

*It is to be noted by the Court that both in her original bill and in her testimony, the complainant speaks of the execution by Ralston of only two deeds, the one of August 28th, 1880 and that of April 19th, 1881, and she attaches copies of them as exhibits. Upon the filing of the answer setting up the facts of the execution of the three deeds, the first one being of date August 26th, 1880, she filed an amendment to her bill stating that she supposed the deed of August 26th, 1880, had been destroyed and hence she did not refer to the same in her original bill. (Transcript, page 48.) In her testimony she always speaks of the deed of April 19, 1881 as the "second deed."

whether her signature was free and voluntary—that there was "not a bit" of solicitation by anyone to induce the signature of the deed, and that it was done freely, voluntarily and in a pleasant manner. (See transcript, pages 128, 129 and 130.)

The testimony of Proudfit narrating what occurred immediately after the execution of the deed of Aug. 28, is still more important as showing beyond question that the making of the deed was perfectly voluntary on the part of Ralston, and was the execution of the identical purpose which he had maintained and in many ways and at numberless times expressed during the eleven years previous thereto. Turpin was not present and there was nothing to induce him to attempt to deceive Proudfit as to his motive. In going down town with Proudfit from the commissioner's office, Ralston voluntarily began talking about the deed he had just signed, and what induced him to make it. There is no hint that he had done it because Turpin or anyone else had suggested it to him or in any manner pursuaded him to do it. There was not even an expression that he was influenced by a desire to please Turpin. There was not the least intimation that he had been induced to make the deed by any belief or apprehension that, situated as he was relatively to Turpin, he felt that his personal interest required him to do so. Every feature of this kind is absolutely wanting in the reasons assigned by him, and the reasons which he does give to Proudfit at a time when he was "perfectly sober" (transcript, page 128) and "perfectly rational," (transcript, page 129), were identically the same reasons which had been given by him during the previous eleven years to all persons with whom he talked about it, viz.; the great friendship which had existed between him and Turpin and his appreciation of Turpin's personal services to him, &c. The reasons thus expressed by him voluntarily to Proudfit were the same as those which had induced him to make the will of 1874, by which he gave to Turpin and his family one-half his estate, reasons which in this will found their tenderest expression in the committal to them by him of the care of his monument and grave after his death. They were the same reasons as those which had influenced him in the will of 1879, to again leave to Turpin's family about one-half his estate—the will in which, made on the eve of his marriage, he passed by the woman he was so soon to make his wife, as well as by all of his blood relatives excepting only his grandmother during her life, and gives his family pictures to Turpin, and puts on record the reason, "having enjoyed his friendship for a long course of years."

Where one has for many years expressed frequently his determination to make a certain gift, assigning his reasons for such intention, and where he subsequently does make the gift, and after having so made it, assigns the same reasons for the act as he had previously assigned for the intention, it would seem to require no argument to prove that the act was the result and consummation of the original and long cherished intent, and that if the original intent was voluntary the final act was equally so.

After the execution of the deed of August 28th, 1880, Ralston remained in Stamford, Conn., while Turpin was in Macon, Ga. The correspondence shows that their relations continued to be of the most friendly and cordial character.

April 14th, 1881, Turpin writes to Ralston that the former deed has been pronounced informal and encloses him another deed conveying the same property to Turpin, trustee for the same beneficiaries, which he requests him to sign. The letter enclosing this deed to Ralston is dated, April 14th, 1881, and is found on page 283 of the record. The letter contained also an enclosure of a bill in equity filed to perfect title to the Ralston Mansion house, which was about to be sold, and which had nothing to do with any matter in controversy in this case. The receipt of this letter and the enclosures are acknowledged by Ralston to Turpin, in the postscript of the letter of April 18th, 1881, (see transcript, page 278,) in which he says he will go down (meaning to New York) Tuesday and send him the papers Tuesday night. They did go down to New York, on the next day, April 19th, and both Ralston and complainant signed the deed before a commissioner, and on the 20th, Ralston writes to Turpin, see transcript, page 278, that on the day before (19th, the date borne by the deed) he had sent him the papers, "all duly signed and sealed by registered letter from New York." Here was a prompt compliance with the request indicative of the most perfectly voluntary action on the part of both Ralston and the complainant. The letter is acknowledged on the day of its receipt, and with such acknowledgment is sent a promise to execute and return the deed the next day, which promise is promptly fulfilled. The deed is returned in a registered letter, although there is no request that it should be so done, showing the interest and desire he felt for its safe transmission to Turpin. The complainant joins in the deed, although the letter of Turpin contains no request for her to do so. The letter contained

a request for her to sign the bill in equity but said nothing about her signing the deed.

The most conclusive evidence that the signing of this deed was voluntary on the part of Ralston is furnished by the evidence of the complainant herself. Turpin was a thousand miles away, and no friend, or even acquaintance present; and the complainant testifies she was coerced by Ralston to sign the deed. She says: (Transcript, page 97). "As to the second deed," (meaning that of April 19th, 1881), "I was told by Mr. Ralston that as I had signed the first, I must sign the second. He told me that if I did not sign it, I would not be his wife any longer than five hours." It would be difficult to furnish stronger proof of the voluntary and unalterable intent of Ralston to do everything which would finally effectuate his purpose to make this gift. It cannot be conceived that one could make this threat and coerce the complainant to sign the deed against her will, if it was through undue influence controlling and dominating his own will that he was himself induced to sign it. The complainant cannot escape the full force and effect of this testimony. It is not simply the fact that it is testimony offered on behalf of the complainant by which she is bound under the operation of a technical rule; it is the testimony of the complainant herself, by which she is most firmly bound by every rule, legal and moral. If the testimony is true, it controls her case against her on the vital point. If the testimony is not true, it is a thing about which she could not have possibly been mistaken, and the fact of its falsity necessarily discredits and renders valueless her entire testimony. *Falsus in uno, falsus in omnibus.* We do not say it is false, and the complainant herself cannot deny its truth.

With the foregoing strong proof that the execution of the deeds was Ralston's voluntary act, we come to the discussion of the question whether anything done by Turpin would destroy the conclusions naturally following such proof, and establish in their stead the conclusion that the making of these deeds was the result of undue influence on the part of Turpin. Up to the time that Turpin went to Stamford, the evidence is uncontradicted that he had never uttered a word or done an act the purpose of which was to induce Ralston to make the gift. With reference to his going to Stamford and suggesting the deed to Ralston, we submit that the controlling principle is this: if the intent was then existent in the mind of Ralston, as it had been for ten years previously, then that voluntary intent is the essential element, and the suggestion as to the particular

form in which that intent shall be executed will not in any manner affect the character of the act as a voluntary act.

The testimony as to what Turpin said or did does not show any persuasion or the attempt to exercise any undue influence. The bill sworn to by complainant alleges that Turpin said to Ralston that he (Ralston) had frequently promised to do something for his (Turpin's) children, &c., and that then was as good a time as any. (See transcript, page 4). In her testimony she gives an altogether different statement of what Turpin said. She says Turpin called Ralston and complainant into the library and reminded Ralston in her presence that his mother had intended to leave some property to his (Turpin's) children, but that he (Ralston) had told her to never mind—that he would see that they got something by his will. She then narrates that he explained to them fully the nature of the deed, and the effect of the same, conveying the same property which he had devised to him, as trustee, in the will of December, 1879. (See transcript, page 95.) The bill, not being evidence, is only pertinent to show the difference between the complainant's two sworn statements. If this is what Turpin said, it was a simple reminder of a fact which he ought not to have forgotten, and we submit there was no impropriety in it, especially in view of the long-expressed intent of Ralston to give Turpin's family this property for their enjoyment after his death.

Turpin, however, says in his sworn answer that he simply said to Ralston, in the presence of complainant, that his marriage had revoked the will of 1879, and enquired of him whether his often expressed intention to give a portion of his property to his (Turpin's) children, was still his wish; that Ralston replied, unhesitatingly, that that was still his wish. Turpin then asked him if he was willing to sign a deed to the same property designated in the will, conveying the title of the property, but reserving the use of said property to himself; that Ralston replied without hesitation he would do so with pleasure; that the complainant also readily assented and expressed her perfect willingness to sign the deed. Turpin in his testimony (transcript, page 209,) testifies substantially to the same thing. Speaking of what occurred during his visit to Ralston and complainant, he says: "I don't think there was an unkind word from bottom to top, or even a feeling that I know of. While there I told Ralston that now that he was married, the will he had made in favor of my children would be of no good; and if it was agreeable to him and to her, I had a deed drawn, and read it to them, and they both said

they would sign it with pleasure, and glad for me to have it that way. The deed just gave the children the same property as the will did, and they both said they would do it with pleasure, and it seemed to afford her as much pleasure as Ralston, and they did not either one seem to make the least objection." And again on the same page he testifies: "I had never used any inducement or persuasion to get them to sign the deed before they agreed to sign it. At the time they agreed cheerfully to sign the deed. I had used no inducement or persuasion, in any manner, shape or form." He says repeatedly in his testimony, in the most emphatic manner, that he never did use any persuasion or threat, or offer any inducement to Ralston to promise to give any of his property to him or his children, and that he did not use or offer any to procure the execution of the deeds.

This repeated and emphatic denial in his testimony, which had also been made in his sworn answer, was a direct challenge to the complainant to produce any testimony to the contrary, if any she could. But no reply is made by the complainant to this challenge, and no word or act on the part of Turpin is proven by the complainant, which can be legitimately construed into a persuasion or a threat, or anything akin to either. She not only does not testify to any such word or act of Turpin, but she does not even intimate that Ralston ever at any time said to her that any such word had been spoken to him by Turpin. If he had been dominated by Turpin, if by persuasion or by threats, or by their personal and business relations, or by any other means or forms of undue influence, he had been induced to convey a large portion of his estate without the active exercise of his own voluntary will, surely somebody in the years which followed, either the complainant in the close relation of wife, or somebody else, at some time, would have heard from him some word which would have expressed his regret at what he had done, or at least some slight suggestion that there was some other reason than his own free will. But in all this record there is not a word of testimony to show any such utterance by him. On the contrary, under all circumstances and at all times, whether drunk or sober, sick or well, whether in Georgia or in New York, whether with friend or with stranger, the testimony is without contradiction that every word uttered by him on this subject, and every act done by him relative thereto, both before and after the date of the execution of the deeds, was to the same effect that it was his own voluntary wish that the property should go to Turpin's children.

The attention of the court is particularly called to the following two statements:

1st. The defendant, Turpin, most emphatically denies, in his testimony, that, at any time, he ever uttered a word of persuasion or threat, or ever offered any inducement to Ralston, either to get him to agree to make a deed or will in favor of himself or children, or to get him to make such deed or will.

2d. Whatever general allegations there may be in the bill, there is not in the testimony a word of evidence of any attempt by Turpin at persuasion of Ralston, or of any threat of Ralston by Turpin, or of any inducement of any kind offered by Turpin to Ralston designed or calculated to get this gift, or the promise thereof, unless the same can be found in the complainant's narration of what occurred in the interview between Ralston and Turpin, at which she was present, in the library of Ralston's house at Stamford. The record will be searched in vain for more.

This brings the inquiry on this point within very narrow limits, for there are but two witnesses as to that interview—the complainant and Turpin. The testimony of each as to what was then said and done is very brief.

The complainant testifies (transcript, page 95) that on the morning after the arrival of Turpin, he called Ralston and herself into the library; that he reminded Ralston that his mother had proposed to leave something for his children, and that he (Ralston) had told her to never mind, that he would see that they got something by his will. She then testifies he added: "Now, I have had that part of the property which you mentioned in a will, some time ago, drawn up in a deed for the benefit of my children, you to have the use of it during your life, and then to go to them after your death. Of course, this will not in any way interfere with your wife's share of the property, as she will have sufficient income to maintain her handsomely in case of your death. You may possibly outlive me, and I hope you will, but it is always best to have these things attended to." She says the deed was then read, and that Turpin added: "Jimmie, the Third street property is of more value than the Cherry street property, on account of the large buildings going up on that street, and in course of a few years will be the principal business street in Macon." This is her full account of what occurred at that interview.

Again calling the attention of the Court to the fact that in her sworn bill she gives a different narration of what Turpin said in the

interview, we submit that there is nothing in that interview as testified to by the complainant, which can be construed into a threat or attempt at persuasion or as the offering of an inducement to get Ralton to make the gift. Her testimony shows that Turpin acted with perfect frankness and fairness. He said nothing to Ralston on the subject until he himself called the complainant in to be present. He reminded Ralston of the purpose his mother had entertained and his voluntary promise made to her. There was no impropriety in his calling attention to that, considered either in the forum of law or of personal delicacy, Ralston's often repeated avowals of intention being remembered. It certainly contained neither threat nor persuasion. It recognized the fact that the will had been nullified. It informed him fully and completely as to the character of the conveyance and the effect of the same. The complainant does not state that any threat or persuasion was used. On the contrary, in her sworn bill she says, (transcript, 4), Ralston "*readily consented to sign the deed of gift.*" The complainant undertakes and professes to give *verbatim* what Turpin said on that occasion, and thus puts the Court in position to judge for itself whether the words amount to persuasion, threat or importunity, and then in her sworn bill says that Ralston *readily consented* to sign, &c. As there is no testimony in the record of any other occasion on which it is alleged that Turpin used any persuasion, importunities or threats, or offered any inducement to Ralston, we submit that under this testimony of the complainant herself, there is an utter failure to prove that on any occasion he ever used the one, or offered the other. Turpin's testimony makes the case much stronger, but we submit that on this issue of persuasion, &c., the case can be safely rested on the testimony of the complainant.

The allegation of complainant, that Turpin, in this interview, deceived Ralston and herself as to the comparative value of the property included in the deed, will be considered separately.

The allegation that neither she nor Ralston understood the nature of the deed, and that they were overreached, is thoroughly disproved by her own narration of what Turpin said in explaining it to them, as well as the indisputable proof that they both read the first two deeds over carefully, and the further fact that they had the last deed in their possession for two days, and went together from Stamford to New York to sign it. The allegation is further disproved by the fact that there is no testimony that Ralston ever said he misunderstood it or was dissatisfied with it, or that she ever so claimed for him, or

for herself, prior to the filing of this bill. It is further shown that Ralston and the complainant were both familiar with this particular form of deed, not only from having had the explanation to them by Turpin, and from having signed the three deeds which they had personally read over, but June 28th, 1881, Ralston signed an agreement (transcript, page 233,) to make the same kind of a deed to Mrs. Smith, and the deed was made by him in accordance therewith. The reservation gave the complainant a special interest in that deed. Although this deed was subsequent to the deeds to Turpin, trustee, if they had not previously understood the nature of the latter, they would have expressed dissatisfaction after having acquired the information through the execution of the Smith deed.

The acquiesence of Ralston and complainant for three years, without complaint or expression of regret on the part of either, is strongly indicative of the fact that the gift was the voluntary act of both. So far from there being any dissatisfaction, the letters of Ralston and complainant to Turpin, subsequent to the execution of the deeds, show a cordial friendship, which proves there was no dissatisfaction. The last will he ever made was on October 21st, 1881. It was in favor of complainant. The duty of having it prepared was entrusted to Turpin, in the presence of the complainant, and in it Turpin was again named as executor, and a provision was inserted that he should not give bond or make inventory and appraisement of the property. All this is utterly inconsistent with the belief that Ralston and his wife considered, or suspected, that Turpin had taken an undue advantage of them—had by deceit and undue influence, overreached them, and had by these means procured for his children a gift of valuable property, which they, of their own free will, would not have given to them.

The charge that Turpin, either by himself or by Ogden, kept a watch over Ralston and complainant until the deeds were signed, is unsupported by the evidence. Turpin testifies that he never thought of such a thing as watching over complainant, as she testifies (transcript, page 212). He says (transcript, page 209,) that Ralston, at his own suggestion, went after Ogden, to go with him to Bridgeport. Ralston and complainant were together in Stamford that night, after returning from Bridgeport, and could have seen a lawyer. They would certainly have conferred together if they thought they were being overreached. After they signed the first deed, they went back to Stamford, and, after two days alone, again returned to New York

to sign the deed of August 28th; and the last deed was signed seven months after, with Turpin a thousand miles away.

Comparative Value of Property Embraced in Turpin Deeds.

The complainant alleges that Turpin deceived Ralston and herself about the comparative value of the property. Turpin testifies that he does not remember that while in Stamford we made any comparative valuation of the property. There was no reason why he should do so as the property included in the deed was the same property previously included by Ralston in the devise to Turpin's children. Even if he did say what the complainant represents (transcript, page 95) it was simply the expression of an opinion as to the influence on the value of the Third street property by the improvements going up on that street. Unless that was a willful expression of an opinion he knew to be false, it would not affect the question. If he had intentionally misstated the amount of rent received from the rent of the stores, it would have been different. The property embraced in the deed was less than half of the property then owned by Ralston. Turpin testifies (transcript, page 210,) that Ralston's property not embraced in the deeds was worth twenty thousand dollars more than that embraced in the deeds.

Alex Block testified (transcript, page 200) that the property embraced in the deeds was worth between forty and fifty thousand dollars, and that the stores not embraced in the deeds were worth between thirty-five and forty thousand dollars. It is shown in this record that the Mansion house was worth $20,000.00, which added to the valuation of the other property not embraced in the deed, would make it between fifty-five, and sixty thousand dollars; an excess of $15,000.00, or $20,000.00 in favor of property not embraced in the deeds.

Henry Horne testified (transcript, page 202) that there is not more than from three to five thousand dollars valuation in favor of the property embraced in the deeds compared with the stores not embraced in the deeds. Adding the $20,000.00 value of the Mansion house, and

there is still a difference of from $15,000.00 or $20,000.00 in favor of the property not embraced in the deed.

This is the entire testimony as to the valuation of the property. It is uncontradicted by the complainant. R. W. Cubbedge, Elliott Estes and M. R. Freeman were put on the stand by complainant to testify as to proper commissions on rents. Two of them were real estate agents, and neither of them was asked by complainant's counsel any question as to the comparative valuation of the property embraced in the deeds and the property not so embraced.

The Influence of Turpin over the Complainant

The complainant alleges that at the time she signed the deeds she was also under the influence of Turpin. Upon this we simply quote the following comment of the learned Judge in his opinion. (See transcript, page 304.)

"It is idle to claim that Turpin had any dominating influence over the complainant. The solicitude which counsel attribute to fear that her reputation would be impaired by Turpin's disclosures, is hardly credible in the case of a woman of her antecedent experiences, and she would hardly value that temporary good fame in the small town of Stamford as equivalent to a block of city property in the heart of Macon." To which he adds that there is no evidence that Turpin ever threatened to reveal her past life, etc.

If the foregoing argument has established the propositions that Ralston had the mental capacity necessary to make a valid deed, and also that there was no pursuasion, or threat used by Turpin, or any inducement of any kind offered by him to get Ralston to promise, or to make the gift, then the contention of the complainant must necessarily be limited to the proposition, that by reason of their relations Ralston could not make a valid deed of gift to Turpin.

We shall endeavor in what follows, to show that under the law such a proposition is equally untenable with those previously examined.

Turpin's Character.

Before proceeding to that branch of the argument, we beg to remark that the defendant, George B. Turpin, has in this record the conclusive evidence of a character which should weigh heavily in his favor in the determination of all doubtful questions of fact in this case. During the life of the elder Ralston he was the trusted manager of his large property. After his death acting under the power of attorney from the administrator, Turpin practically administered upon and wound up his estate. He subsequently became the guardian of the person and the property of the younger Ralston, and for two years as such had supreme control of all his property. He was afterwards the sole executor of the will of Ralston's mother and wound up the business and distributed the property thereunder. As previously stated all of his acts in the control and management of these large properties are necessarily on record in the probate and guardians court in Macon, open to the examination of all. The able and vigilant counsel for the complainant are unable to find a single error or mistake at which to point the finger of criticism. The only irregularity disclosed in all of these records is his voluntary omission to collect $3,000.00 from young Ralston, which the Court had awarded him as his due. This case was tried in the community where all this work was done and where he had lived as a business man for nearly forty years. If in the management of these properties there had been on his part anything unclean or crooked, even though not disclosed by the court records, there would have been persons in Macon to testify to it. But from all the witnesses, with the exceptions to be presently noted, the uniform testimony has been of correct and upright dealing. Out of the crucible in which his character has been tried, has only issued the pure gold of honesty, integrity and loyalty to the friendships of father, mother and son.

One of the exceptions to this uniform testimony is found in the evidence of the complainant herself, who seeks to show that Turpin abandoned Ralston after he had secured the deeds. The other exception is found in the testimony of W. D. Palmer, who is the security of the complainant upon her appeal bond. His testimony (transcript, page 188,) as to what Turpin said about tearing up Ralston's wills,

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The charge in this bill against Turpin is of the gravest and most heinous character. It is that he cunningly and fraudulently overreached his former ward, the son of his lifelong patron and friend, and that while he was little better than a maudlin imbecile, he had deceived him and, by importunities and the exercise of undue personal influence, he had illegally acquired a large portion of his property. As laid down in Hunter vs. Atkins (3 Mylne and Keene), the proof of his good character is properly to be considered as raising a presumption against the truth of such a charge.

Legal Principles Applicable and Authorities Discussed.

In order to determine whether the law raises any presumption against the validity of the gift from Ralston to Turpin's children, it is necessary, first, to determine whether there were any confidential relations existing between Turpin and Ralston at the time of the gift; and also to determine the nature of those relations, for in some confidential relations the presumption is against the validity of the contract, or validity of the transaction, and in others there is none.

In connection with this branch of the argument, we refer the Court to the previous discussion in this brief of the nature, under the evidence, of the personal and business relations between Turpin and Ralston, beginning on page 48 and ending on page 61.

Wherever the relation implies control or dominion—such as guardian and ward, trustee and *cestui que trust*, etc., all dealings between the parties are subject to an adverse presumption, because those relations offer opportunity for the exercise of dominion over the will of another. Hunter vs. Atkins, 3d Mylne & Keene, 113; Kerr on Fraud and Mistake, pages 176 and 177; Smith vs. Kay, 7th House of Lords Rep., 751; Ulrich vs. Muhlke, 61 Ill., 499.

There are other relations recognized as confidential, such as principal and agent, &c., which do not imply dominion or control; but where dealings between parties are closely scrutinized because these relationships offer opportunities for the abuse of the trust or the confidence reposed. See previously cited authorities.

In the first class, to-wit: as between guardian and ward, confidence is implied as well as dominion.

In the latter class, confidence alone is implied, while dominion is not contemplated.

To say that an agent is in a position to dominate the will of the principal is to put the creature over the creator—that the servant is greater than his lord. No Court has ever held that a person holding a position revocable at any time at the will of another, is in a position to exercise a controlling dominion.

The relations existing between Turpin and Ralston at the time of this gift, was that of principal and agent. The law will presume

that the principal had confidence in the agent; but does not presume that the agent had dominion over the principal.

There are certain acts of the agent which will always be set aside at the instance of the principal, to-wit: the agent to sell cannot himself be the buyer; nor can the agent to purchase be the seller; and this is true without reference to the good faith of the agent. This principle of law rests upon the grounds of public policy. 2d Pomeroy's Eq., Sec. 959; Story's Eq., Sec. 315.

While all transactions between the principal and agent (such as contracts or gifts between themselves) are closely scrutinized for the purpose of ascertaining that there has been no abuse of the confidence reposed, the law raises no presumption against the contract or gift. The only inquiry which the law will make in cases of this kind is: was there any confidence reposed, and has it been betrayed? While the law will presume confidence when the relation of principal and agent is established, the burden is upon the party attacking the contract, or gift, to show that such confidence has been betrayed. We find the rule tersely stated in 2d Pomeroy's Equity Jurisprudence, section 951: "Equity will relieve where influence is acquired, and abused; or where confidence is reposed, and betrayed." The first part of the rule, to-wit: that equity will relieve where influence is acquired, and abused, refers to that class of confidential relations where the law presumes both confidence and dominion, such as guardian and ward, trustee and *cestui que trust*, parent and child, etc. In this class of cases both confidence and dominion are presumed, and hence the presumption arises against the transaction, whether it be a contract or gift. But even in this class of cases, where both confidence and dominion are presumed, and where there is a presumption against the validity of the transaction, there is no prohibition against gifts or contracts between such persons, and if the party claiming the benefit of the gift can show that it was the voluntary act of the donor, free from any undue influence, the gift will be upheld. 2d Pomeroy's Eq., Sec. 961; Huguenin vs. Baseley 14 Vesey, Jr., 273.

It cannot be claimed that Turpin's relation towards Ralston at the time of this gift was within the scope of those principles which apply as between guardian and ward. Turpin had fully settled with Ralston eleven years before the date of the transaction now assailed. All accounts had been settled; all monies, notes and property had been turned over to Ralston, and receipted for by him to Turpin, (see transcript, page 269,) and certainly there can arise no presumption of

undue influence existing at the time of this transaction—eleven years after the relationship of guardian and ward had ceased and after all accounts had been settled.

In the case of Kettrige vs. Belton, (14 N. H., p. 401), the Court held that a transaction between a guardian and ward, made three years after the settlement of their accounts, was valid, and that the emancipation of the ward from the influence of the guardian would be presumed.

The Code of Georgia (Section 1847) puts a limitation of four years upon the ward's right to reopen the account. The Section is in the following words: "No final settlement made between guardian and ward can bar the ward, at any time within four years thereafter, from calling the guardian to a settlement of his account, unless it is made to appear that the same was made after a full exhibit of all the guardian's accounts, and with a full knowledge by the ward of his legal rights." This may be taken as indicative of the theory of the law, that within four years the ward would have become so entirely independent of the guardian's influence as to raise a conclusive presumption that the ward had instituted an investigation for himself into all the dealings between them. There are a number of cases where gifts by the ward to the guardian have been set aside; but we think we are entirely safe in saying that upon an examination of the facts, it will appear that the gifts were made within a short time after the arrival of the ward at majority; many of them before settlement of the accounts; some of them where the guardian demanded the gift as a condition precedent to settlement, and some where the guardian still retained a dominion over the property. An examination of these cases will show how different they are from the case at bar, when the act assailed was done by a mature man (then thirty-two years of age), who at the time resided a thousand miles from the place of residence of the guardian. We do not think, therefore, that the complainant can claim that this case is affected by any presumption which the law raises with reference to transactions between guardian and ward.

It is true that there are some cases in which the Courts have said that where a guardian, without settling with his ward and delivering his property to him, continues to act as such, the accounts between the parties will be subject to the same rules as pending the relationship. An examination of these cases will show that the application of the principle is wholly limited to questions of account; and, of

course, the propriety of the rule will be conceded, that the guardian, like every other fiduciary, should be honest in his accounts.

It is also said by Pomeroy (Vol. 2, Sec. 961), that the rule as to guardian and ward will be applied to cases of actual guardianship, whether there was a legal guardianship or not. (See Note 3d, page 495). An investigation of the cases cited in support of this statement shows that they were not cases where the guardian had continued, either as guardian or as agent, to manage his ward's property, but that they are cases of persons who, by their own act and without authority of law, have made themselves what may be called guardians *de son tort* of minors. Each case cited is that of a minor. In the relationship of guardian and ward, the guardian has the custody both of the person and of his property, and in his management of the property he not only receives the income, but makes the disbursements. This statement will at once exhibit the fundamental change which occurred in the relationship of these parties when Turpin ceased to be guardian, and when Turpin & Ogden became simply his real estate agents in Macon to collect his rents and to remit them to him, accompanied with monthly or quarterly statements.

The evidence in this case does not show that Turpin was the manager of Ralston's property beyond the collection of his rents. Whenever there was anything important, like a sale or a settlement, Ralston acted for himself. Ralston had complete possession and control of his own property. There is nothing in the evidence to intimate that Ralston ever felt that Turpin had any dominion or control over his property; nor is there any intimation in the evidence that Ralston could not, at any and all times, have done with his property as he saw fit; nor is there anything in the evidence to intimate that Turpin had any further management of the property than simply to collect rents, have repairs made, and the property insured, &c.

The principles laid down in the authorities above cited abundantly establish these two propositions, to-wit: That there is nothing in the ordinary relationship between a real estate agent to rent out property, and to collect rents, and the owner of the property, which establishes any such confidential relations as will raise a presumption against the validity of a gift of a portion of the real estate by the owner to the agent. Nor, does the relation of friendship and esteem, and great personal confidence in the integrity and capacity of such agent, resulting from long service of the agent to the donor, and to his father and mother before him, establish such a relation of trust

and confidence contemplated by the law as one which will raise a presumption against the validity of a donation of a portion of the real estate by the owner to the agent.

While the complainant is compelled to admit that the relation which existed between Ralston and Turpin at the time this deed of gift was made, to-wit: that of principal and agent, was not such a one of itself as would, under the law, raise a presumption againt the validity of the gift, for the reason, that while the law presumed confidence, it did not presume dominion, yet, the complainant urges that Turpin had acquired dominion over Ralston, pending the relationship of guardian and ward, and that after this relationship had ceased, and a settlement of all accounts was had, Turpin still continued to manage Ralston's property in Macon, and that by reason of this fact, the dominion which Turpin exercised over Ralston while he was his ward continued up to the making of this gift. To this we reply: that if this be true, the burden is upon the complainant to prove it as a fact, and she cannot rely upon any presumption of law to establish it. As already stated, the law will not presume that such a dominion continued to exist for so long a time, to-wit: eleven years after the relationship of guardian and ward had ceased; and that if the complainant relies upon a presumption to establish undue influence, it must be such a presumption as the law will raise by virtue of the relationship existing beween the parties at the time of the gift; and we have endeavored to show that that relationship, being one of principal and agent, no presumption arises.

If the complainant claims that the law presumes that the declaration made by Ralston, when he was Turpin's ward, of his intention to leave Turpin his property, or a portion of it, was caused by the dominion that Turpin as his guardian exercised over him, then we reply: that his frequent declarations to the same effect, made long after the relationship of guardian and ward had ceased; as well as the will of 1874, which was made freely and voluntarily, without hint, intimation or suggestion from anyone, and which left one-half of his property to Turpin and his children, as well as the will of 1879 substantially to the same effect rebut the presumption of dominion, and strengthen the position of defendant that that declaration, as well as all others on this subject, was made freely and voluntarily; and that that declaration, as well as all subsequent declarations, and as well as the wills set forth in the record, establishes, beyond controversy, that the same were freely and voluntarily

made, and not brought about by any undue influence that Turpin may at any time have exercised over him. All that the complainant can contend for, is that the fact of Turpin & Ogden's renting Ralston's property in Macon after the relationship of guardian and ward had ceased, establishes that Ralston's confidence in, and friendship for, Turpin, continued to exist up to the time of the making of the deeds. This we admit, and reply that the existence of confidence and friendship is no reason to set aside the gift, or to impeach it; but on the contrary, it is a very strong reason for upholding it. This principle is very clearly established in the celebrated case of Hunter vs. Atkins, (3 Mylne & Keene, p. 113,) with reference to which Mr. May, in his work on fraudulent conveyance, says: "No better epitome of the law on this subject can be found than in Lord Brougham's judgment in Hunter vs. Atkins." Story also approves it as a leading case.

This was a case of a gift by a principal to his confidential agent, the donor being upwards of ninety years of age, and for many years the personal friend of his agent. The gift was also made without the intervention of a disinterested third person. It was charged that the defendant procured the deed executed by Admiral Hunter while he was laboring under a fit of mental derangement, and that he had no friend or advisor, and that Atkins possessed absolute control and influence over him, and was able to make him do whatever he pleased. That the deed was never read over to Admiral Hunter, or perused in his behalf by any professional advisor, and that he did not understand the effect and purport of the deed which he had executed.

The attention of the Court is directed to the entire decision, as no extract from it will, of itself be sufficient to convey the full import of the same. Atkins is spoken of as the "Alderman," and Hunter, as the "Admiral." We call special attention to the following extracts from the decision:

"If the Alderman did stand in confidential relation towards him, (Hunter,) then the party seeking to set aside the deed could not be called upon to show direct fraud; but he must satisfy the Court by circumstances that some advantage was taken of the confidential relation in which the Alderman stood. If the Alderman stood towards the Admiral in any of the known relations of guardian and ward, attorney and client, trustee and *cestui que* trust, then in order to support the deed, he ought to show that no such advantage was taken; that all was fair; that he received the bounty freely and knowingly on the donor's part, and as a stranger might have done; for I take the rule to

be this: there are certain relations known to the law as attorney, guardian, trustee; and if a party stand in these relations to client, ward or *cestui que trust*, and takes a deed, or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge; putting the other party on his guard; bringing everything to his knowledge which he himself knew. In short, the rule rightly construed is, that the person standing in such relation must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party beyond what may be the natural and unavoidable consequence of kindness arising out of that relation. The client, for example, may naturally entertain kindly feeling toward the attorney or solicitor by whose assistance he has long been benefited, and he may safely and wisely desire to benefit him by a gift, or, without such an intention being the predominating motive, he may wish to give him the advantage of a sale or a lease. No law that is tolerable among civilized men—men who have the benefits of civility, without the evils of excessive refinement and over-done subtlety can ever forbid such a transaction, provided the client be of mature age and sound mind, and there be nothing to show that the disposition was pressed, and that the attorney or solicitor availed himself of his situation to withhold any knowledge, or to exercise any influence hurtful to others and advantageous to himself."

Referring in this decision to the case of Griffiths and Robbins, Lord Brougham says: "That was a case of an aged female, stricken with blindness, or nearly so, and reduced by her age and her infirmities to a condition of long dependence upon a niece and the husband of that niece, to whom she made a gift; and the present Master of the Rolls, then Vice-Chancellor, held that persons claiming the benefit of the gift were bound to show that it was the result of her free will, and effected by the intervention of some indifferent person. But it is quite clear that he used this as one of the obvious tests or criterion of that for which we seek in all of these cases, viz: the proof of a voluntary and deliberate act, and not the only way in which the deed can be shown to be of that description. No man can doubt, for instance, that if letters had been produced, written by an old woman for a course of time, and without any interference at all; or conversations had been proven in which her deliberate

intention had been expressed under no agency of influence or deception, the gift would have been good. To hold the contrary would be to say that the law will not allow a person dependent upon the kindness of others for her comfortable existence to show her gratitude towards them in the disposal of her property. In other words, to deprive such a person of that power over her property, whom it most of all imports to possess and to use that power of disposal. In no other case has anything of the kind ever been laid down; and I am of opinion that it is not laid down in Griffiths vs. Robbins, unless you take the letter of the judgment against it plain meaning."

In the same case, the Lord Chancellor says: "The rule, I think, cannot be laid down much more precisely than I have stated it—that where the known relation of attorney and client, guardian and ward, trustee and *cestui que* trust, exists, the conduct of the party benefited must be such as to sever the connection, and to place him in the same circumstances that a mere stranger would have stood, giving no advantage save only whatever kindness or favor may have arisen out of the connection; and that where the only relation between the parties is that of friendly habits, or habitual callings on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage should be made of that influence thus acquired. The limitations of natural and unavoidable kindness, with its effects, and undue influence exercised, or unfair advantage taken, cannot be more rigorously defined. Nor is it, perhaps, advisable that any strict rule should be laid down—any precise line drawn. If it were stated that only certain acts should be the only test of undue influence, or that certain things should be required to rebut the presumption of it (such as the calling in of a third person), how easy would it be for a cunning man to avoid the one, or protect himself by means of the other, and so place his misdeeds beyond the denunciation of the law, and to secure the fruits of them out of its reach. If any one should say that the rule is thus recognized, which from its vagueness cannot be obeyed, because it cannot be well discerned, the answer is at hand. All men have the interpreter of it within their own breasts; they know the extent of that influence, and are conscious whether or not they have taken advantage of it in a way that they would feel indignant if a person in the same circumstances should do in regard to themselves. The circumstances of this case, therefore, are to be carefully examined and weighed, the general rule being of a kind necessarily so little capable

of exact definition; and on the result of the inquiry we are to say, has or has not an undue influence been exerted, an undue advantage taken?"

Lord Brougham further says: "The two individuals, however, had, besides the intercourse of acquaintance and business, been united in very strict friendship for a period of about forty years. Their ages were very different, but they had been shipmates in former times, and corresponded, as all the evidence showed; and there was no one for whom the veteran seaman had so great a regard as for his ancient friend and comrade. If this bond may be said to have increased the Alderman's means of influencing him, it points, on the other hand, to a source of kindness and preference altogether legitimate and pure. Indeed, this consideration goes further; it materially lessens the weight of any remark that might arise from the exercise of influence acquired by the confidential employment; and, further still, it even impairs the force of any inference to be drawn from the other relations in which the parties stood towards each other, in proof of the fact that such influence had been used, for it offers an explanation of the favor shown without having recourse to the supposition that the knowing or crafty counselor had pressed upon the less wary client."

In speaking of the evidence of voluntary intent on the part of the Admiral, the Lord Chancellor says: "It appears, and nothing can be more important to the whole discussion, that many years before, as early as the 23d of October, 1811, he had been minded to make an instrument of some kind to enable the Alderman to act in furtherance of his wishes."

We quote at length from the decision in Hunter vs. Atkins, as it establishes several propositions which we contend for in this case, and hereafter it will only be necessary to allude to the quotations above given.

The case of Ulrich vs. Muhlke *et al.* (61 Ill., p. 499) recognizes the same legal principle as that stated by Lord Brougham in the case of Hunter vs. Atkins. The Court says: "We have examined the rule of equity invoked by the complainant as applicable to such cases; and no commentator on the principles of equity, and no reported case, goes to the extent of saying that by force of such a relation the deed is *ipso facto* void. If such were the rule, a grateful man to whom important services had been rendered; whose estate had been saved from ruin by a friend who had no stipulated fee in compensation; would be prohibited from receiving any testimonial of the grat-

itude of the other. Kindness, important services and friendship to the distressed would be under legal ban. A man in the full possession of his faculties would be prevented from selling or giving away any portion of his large estate to one by whose advice and counsel it had been rescued from ruin. It is difficult at all times to prove negatives; to prove that a grantee standing in this position did not use the influence he possessed over the grantor to procure the deed; that he did not abuse the confidence reposed in him; nor does the rule require it."

There is a great deal of testimony showing that Ralston had confidence in Turpin. All witnesses were plied with questions to elicit this fact, and they show that Ralston not only had confidence in him, but that there were the strongest, and best, and most worthy reasons why he should have had this confidence. The Court would naturally expect, after being surfeited with testimony of this sort, that the complainant would then have attempted to show an abuse and betrayal of this confidence; but not a fact is proven in the entire record which supports any such conclusion. It cannot be claimed that there was any deception as to the consideration of the deed. Ralston having already made two wills in favor of Turpin and his children; and having already expressed his intention of leaving to them his property, or a portion of it; and this appearing to be the free and voluntary action of Ralston, there was no impropriety (certainly, no legal wrong) in Tupin, familiar with the long-expressed wish and desire of Ralston, calling his attention to the fact that his marriage had revoked the will of 1879, and inquiring whether it was still his intention and desire to leave that property to his children. Certainly, there was no abuse or betrayal of confidence in this, as the inquiry was made in the presence of Ralston's wife. As already stated, unless there is an abuse of the confidence reposed, the validity of the deed will not be affected. (See 31 Beav., p. 629; 1 Simons, p. 1; 42 Am. Rep., p. 635; 4 Russ, p. 509.)

It clearly appears that Ralston's confidence in Turpin was not only derived through his past connection with Ralston's father and mother, but that it had been worthily won by Turpin's relation to the young man himself. Mr. Jones, President of the Central Georgia Bank, confirms Ralston's own statement that but for Turpin his whole property would have been rapidly dissipated. Mr. Jones himself says: "I would not have been bothered with this drinking young

fellow for all that he was worth." Turpin submitted to be thus bothered and annoyed, and exerted his influence to restrain Ralston from drinking, gambling and extravagance, and from being ensnared by a lewd woman. This is absolutely the only kind of influence which it is shown that Turpin exercised, or attempted to exert, over Ralston. Surely it cannot be contended that equity has any rebuke for the conduct of a man who occupied Turpin's relation toward Ralston, and who used it as he did. If such an influence is to be discountenanced, Courts of Equity, which have themselves been called the "guardian to those who are subject to imposition," would practically advertise to the world that every wealthy young man, living a life of dissipation, is the legitimate prey of sharpers and harlots; and that the elderly and trusty friend of his father and mother, and of himself, is not to be permitted even to accept the bounty which the young man of his own volition, and for a space of time covering more than a half score of years, had expressed his intention of bestowing upon the children of his friend. If such a transaction should be set aside, it would almost necessarily follow that the gift made by a profligate son, under the same circumstances, to his father, must be annulled. As Lord Brougham says in the paragraph already quoted: "Such law as this would not be tolerable among civilized men."

The cases in which Courts of Equity have set aside gifts between parties by reason of constructive fraud, may be analyzed into two groups; and it will be found that nearly, if not all, of the cases relied on by the complainant will fall into the one group or the other.

1. Cases in which the donor himself seeks to set aside the gift upon the ground that he has improvidently stripped himself of all of his property, or that his confidence has been betrayed, or advantage taken of him. Such, for example, is the case of Wright vs. Proud, (13 Vesey, Jr., page 136), in which a young man who had been the inmate of an insane asylum was procured to make a deed while still at the asylum, although nominally as a boarder.

Such, also, is the celebrated case of Huguenin vs. Baseley, in which a clergyman, by spiritual supremacy and actual artifice, had procured a gift in favor of his family.

2. There is another class of cases in which such gifts have been set aside because of their unnaturalness, the donor ignoring the paramount objects of his bounty. Courts of Equity delight to do justice in such cases; where, for instance, one rapacious child has secured the entire estate, or where the weakness of an old woman has been

imposed upon, or where advantage has been taken of the distressed, or where hard bargains have been driven with expectant heirs. A case of this sort, which equity readily takes hold of, is found in 4 Otto, p. 511.

In this case the complainant, who seeks to recover from the children of Turpin the long-intended bounty of Ralston, succeeded, by the exercise of an undue influence, in marrying Ralston. The complainant was a known prostitute, an inmate of several lewd houses; her influence over Ralston was most imperious; she got Ralston to marry her against the opposition of Ralston's family and of his friends; and now she seeks to set up, in avoidance of Ralston's deed to Turpin and his children, the very intoxication which her own Bacchanalian orgies with Ralston fastened upon him! She drank with him, both he and she becoming beastly drunk; she fought him; she abused him; she maltreated him to such an extent that Ralston, in the presence of others, called her a "damned liar." (For a full statement of the relations between Ralston and complainant, we refer the Court to pages 37 and 42, inclusive, of this brief).

The relations which she sustained towards Ralston were presented to the Court below, and the attention of this Court is called to the same; not for the purpose of denying her any legal rights she may have, although a known prostitute, but for the purpose of showing that there was no unnaturalness in Ralston's making a gift to the children of Turpin, who was his friend, and who had preserved his property and attempted to save him from ruin. No Court, under the facts of this case, and in view of the life which the complainant led Ralston, would say that this gift was unnatural. If, as Lord Wilmot says, "No polluted hand shall touch the pure fountains of justice," and if a Court of Equity requires as a condition precedent to an entrance upon its threshold, moral cleanliness and decency, it will certainly be little, to ask that this Court shall say, under all of the facts, that there is no unnaturalness in this gift so far as this complainant is concerned.

If, therefore, there is nothing in Turpin's relation towards Ralston to invalidate this gift, the next question is, whether, under all the facts in the case, the deed should be set aside and cancelled.

The great general principle is well recognized, that the law places no restriction whatever upon the right of an individual to dispose of his property. The evidence is overwhelming that it was Ralston's

intention for a long period of time (wholly independent of any suggestion from Turpin) to make this gift. Outside of Ralston's statement to numerous witnesses, the will of 1874 was drawn up by his attorney in accordance with his minute directions. The provisions for the will of 1879 were carefully delivered to Mr. Ogden. The evidence with reference to the execution of the three deeds shows that Ralston was thoroughly rational and fully understood what he was doing. After the execution of the deed of August, 1880, he explained to Mr. Proudfit at length his reasons for the act. For a full review of the evidence as to Ralston's purpose to make this gift, see this brief from page 43 to 47.

It is difficult to say what could make a stronger case than these three things:

1. The irrefragable proof of a long intention.
2. The actual execution of that purpose.
3. Expressed satisfaction with this execution, and acquiescence for three years in what had been done.

There are certain signs or circumstances usually met with in cases of undue influence.

One is, the improvidence and unnaturalness of the bounty procured. This is wholly lacking here. Ralston's relations with his wife, as shown by the pictures of their domestic hearth, were not such as to make him feel that he could not reasonably bestow upon Turpin's children the portion of his property which he gave to them.

Second, another circumstance is the secrecy generally attending the gift; a failure to give notice to the persons injuriously affected. Here the evidence shows that Turpin never mentioned the matter to Ralston, except in the presence of Ralston's wife, who is now the objector.

Third, another circumstance is, that the person exerting undue influence usually puts it forth by means of what may be called a "physical" personal influence; that is to say, he is present during all of the transactions. The proof shows that Turpin was not present during the oft-repeated declarations made by Ralston as to his intention to give this property to Turpin and his children; and that he was not present at the execution of either of the wills. Also, that when Ralston and his wife went to Bridgeport to sign the first deed, Turpin did not go with them; and when the last deed was signed the same was sent to Ralston by mail, and Turpin was a thousand miles away.

While in one sense this deed was voluntary, yet there was a quasi meritorious consideration for it. A meritorious consideration is one which is a little more than good and is yet not quite valuable. This is one nook and cranny of the law which is not yet completely filled up. No Court, and no dictionary, has ever attempted to give a definition of a meritorious consideration which would embrace all the instances of it. In this case, a part of this consideration was the rendition of services the value of which Mr. J. E. Jones estimated as more than the whole property involved. Besides this, is the proof that when Mrs. Ralston, the mother of James A., was preparing her will, she stated to Mr. Turpin that she would make a devise in his favor but that Jimmy had said he would do it, and that it would be done. As the result of this promise, James A. actually acquired a large amount of property under his mother's will, which but for that promise would never have become his, but would have become Turpin's. When Turpin spoke to Ralston about the deed of gift, Ralston, by his acquiesence in what Turpin then said, admitted the full truth of these facts. This was such a state of facts as would authorize a Court of Equity, if the property had been mentioned, to decree a specific performance of the agreement of James A. Ralston. It is well settled that when a testator is about to make a will and devise property to A, and B assures him that if he omits the devise he who is to acquire the property will make the provision for A., that a Court of Equity will declare B the trustee for A and compel the execution of the agreement. These were precisely the facts in the case of Porter vs. Allen, 54 Ga., p. 623, in which the Court says that a meritorious condsideration involves almost any state of facts where there is a motive and means on one side and merit on the other. Although the facts here do not come up to the rule that would be required in a bill for specific performance, yet they are amply sufficient to bring Turpin within the spirit of the rule and to show that there was a meritorious consideration for the deed as well as a consideration of gratitude and affection. A Court of conscience is asked to undo what would have been unconscientious for Ralston not to do—to make itself the instrument of fraud.

But the contention of the complainant is, that the deed was void because procured by undue influence.

On the question whether the law of undue influence is the same in the case of deeds and wills the authorities are to be found, like Swiss

troops, "fighting on both sides." The weight of authority is that the same principles apply, but in those cases which deny this, the reason given is that it is more unreasonable that a man should by a gift *inter vivos* deprive himself of property than that he should make a provision to take effect after his death. In this case, however, although Ralston made a deed, the benevolence is of a post mortem character, so that practically this deed is to be considered as if it were a will. Ralston's statements that he did not expect to live long, and the nature of his settlement in the Smith case, by which he conveyed stores, the conveyance to take effect after his death, show that the only thing which he desired to keep intact was the revenue from his property; hence there was just as little sacrifice involved in the execution of the deed to Turpin as if he had made a will, and the law in regard to wills is therefore applicable.

We ask the Court to advert to the testimony already referred to in regard to Ralston's long cherished intention, and especially to consider how that intention was produced. Lord Eldon said this was the material inquiry. If it was suggested by any human being, it was by his mother. Turpin never referred to this matter in any conversation with Ralston until after Ralston had repeatedly declared his intentions, and had evidenced it by two solemn instruments.

The evidence as to his previous declarations and acts are extremely weighty, especially where undue influence is charged. 1st. Redfield on Wills, 525, *et seq.* In 4th Bradford 311, it is held that even casual staements running through a long period of time and not controverted by proof of a greater affection for another than for the person receiving the bounty, are an "important element" in the case. In 4th Wright, 483, similar statements were received as evidence of "a long cherished purpose." See Atkins vs Hunter, 3d Mylne & K., 113. The testimony here is far more potent than in these cases because it partakes of the deliberation and caution which attend the execution of a will. The previous wills important, 1 Redf. W., 525, 535.

What then is undue influence? The authorities generally do not give a precise definition, but they all agree that to constitute undue influence the influence must be such as to subjugate the mind of the donor, to destroy his free agency, to substitute the will and purpose of the donee in place of the volition of the donor. To make the donor virtually helpless under the resistless dominion of the purpose of the person seeking to control him. While it may not require the

same amount of evidence to establish undue influence in a case of confidential relation, as in case of wills, yet the effect must be the same to-wit: to deprive the party of his right to act freely and voluntarily.

How infinitely short does this case fall of any approach to, much less correspondence with this description of undue influence. Mr. Kerr on page 185, quotes as applicable to the law of wills, the charge of Mr. Justice Wilde, "persuasive appeals to the affections to a sentiment of gratitude for past services are legitimate influences and may be fairly pressed on the Testator." On the other hand, pressure of what ever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment is a species of restraint under which no valid will can be made." (See the whole of this citation.) See also 1st Jarm., 36; 3d Eng. Ecl. R., 252; 3 Hagg. R., 466; 5 Strob. R., 167; 3 Serg. & Rawl., 267; 5 Gill. & John., 269; 1 Rich. R., 80; 1 B. Mon., 351; 2 Speers, 268. Seenote to 2d Pom Equity Sec., 951 bottom of page 471.

Persuasive appeals to the affections, or to a sentiment of gratitude will not render a gift or contract between parties occupying a confidential relation invalid unless the Court is satisfied they were of such a character, as to deprive the donor of his free will.

If it be true as a fact, that Ralston's mother had left all of her property or a large part of it to him—with the understanding, that Ralston had already made a will, or would make a will providing for Turpin (and the fact is not disputed), then Turpin certainly had a right to mention it.

If Ralston had frequently declared his intention to leave Turpin and his children his property, or a large part of it, and had executed wills to this effect, there was no legal wrong in Turpin calling Ralston's attention to the fact that his marriage had revoked these wills, and inquring if it still was his intention to leave the property described in the will of 1879, to his children. This can not be said to be a persuasive appeal to affection or sentiment.

Nothing is better settled than that mere mental weakness will not invalidate a contract or gift unless the grantor or the donor be *non compos mentis*. (See Bigelow on Fraud, page 281, showing that gifts and contracts stand on the same footing; also 30 Wis., 78; 6 Casey,

89; 6 Wright, 114; 1 Cowen, 207; 26 Wendell, 255; 25 N. Y., 970; 9 Grett., 330; 12 Pick., 212, 2 Ir. Eq., 456.

The weight of the evidence strongly is, that Ralston was capable generally of making a valid conveyance, except when on a bad spree. The uncontradicted evidence is that when he executed the deeds in question, he was perfectly sober. The Northern witnesses testify only as to a general condition, and without any knowledge of his past history. Their testimony is entitled to no weight in view of the fact that the purpose which Ralston executed in 1880 was a purpose formed at an antecedent period, when he was confessedly competent to form it. It would seem, also, that the act of the complainant in taking a deed from him in 1882, when he was in a far worse condition than at any time in 1880, ought to estop her from alleging his incapacity. Her own counsel dealt with Ralston as if he were capable of attending to business, in the Smith case. Deeds to large amounts of property, made subsequent to this deed by Ralston, are now held by parties who accepted them as the deeds of a man capable of contracting.

The charge in the bill, that when Turpin sent the last deed to Ralston he was aware of Mrs. Smith's claim, is not sustained by a scintilla of evidence. Hs emphatically denies it, and claims that he informed Ralston of all that he knew; but this is of less consequence, in view of the fact that the second deed only purported to effectuate what was certainly an intention, free from any suspicion as to claim of Mrs. Smith, executed by him in August previous; and in view of the further fact that the deed of August may be sustained as a deed under the authorities mentioned in the following paragraph.

In determining whether an instrument is a deed or will, the Court will be guided by the following rule: The Court will look to the form of the instrument as evidence of the intention. This is clearly a deed in form. Tbe first clause will prevail over a later inconsistent clause. Here the conveyance of the present estate to Turpin, as trustee, precedes the recital as to Ralston's death. The whole instrument will be construed so as, if possible, to make it stand in accordance with its intention, and here the reservation in Ralston's favor would have been idle and useless if the paper was a will. These positions are sustained and applied to instruments like this in the following cases: 56 Ga., 513; 31 Ga., 720; 22 Ga., 472-491; Youngblood vs. same, February Term, 1885 (pamphlet).

It will be the effort of Complainant's counsel if they should fail to satisfy the Court that the deed should be set aside upon the ground of confidential relation, undue influence or mental weakness, to mass them all together and to claim that by their accumulated force they make a case for the interposition of equity.

But unless the Court is satisfied that the complainant has made a case on at least one of the grounds on which it is based, the other consideration cannot be taken into the account, unless the Court should consider his mental condition in determining the question of undue influence necessary to deprive Ralston of his free volition.

In this case great weight is to be attached to the long acquiesence of Ralston in the deed and also his wife and of their practical ratification of it. The effect of this is fully set forth in Second Pomeroy's Equity, Section 965, Note 2d, and the numerous cases there recited. If Ralston had thought that the diminution of his estate by the Smith settlement should have decreased his bounty to Turpin's children, he had nearly three years within which to to have complained. There was not a suggestion or intimation either from him or her of any dissatisfaction; this, too, after full knowledge of the facts, full opportuntty to ascertain everything and full opportunity to consult independent counsel.

The authorities lay down the rule that gifts from ward to guardian, *cestui que* trust to trustee, etc, are more closely scanned than sales between the same parties. And the reason of this rule is apparent—the fact that a ward is willing to part with his property without compensation, creates a stronger presumption that he is induced to do so by the undue influence of his guardian—than when he parts with it for a compensation or price agreed upon.

But in the case of a gift from the principal to the agent, a different rule prevails. When the principal sells to the agent, the transaction in closely scrutinized, and if the agent has not made a full disclosure of all he knows as to the subject matter of the sale when the acquaintance with the thing sold is peculiarly within his knowledge by reason of his position as agent, then the sale will be set aside upon the ground of violated confidence.

But where the principal makes a gift to his agent he parts with his property without consideration, and there can be no pretense as to

deception as to value. These principles are fully recognized in Harris vs. Tremenheere, 15th Vesey, Jr., 34.

In this case there were certain leases given, and some for value. The Court said it had no authority to set aside the gifts as they appeared to be voluntarily made—as to leases for value, the Court directed an inquiry, whether defendant had paid full value. The verdict upon the trial showed that it was not a full consideration, upon which a decree was made, that the lease be delivered up.

Every one of the cases cited by complainant's counsel, in the Court below, was a case of sale and not of gift, with one exception, to-wit: that of Taylor vs. Taylor, 8th Howard, page 199, and that was a case of a deed from a female child to her parent, just after arriving at age. This young lady lived in the house with her parents, and the deed was extorted from her by false representations of various kinds—by extreme urgency and harsh treatment—and also by the hope that the making of the deed would reconcile her parents to her marriage, which they had opposed. Even in an extreme case of this kind—which affords a striking illustration of confidence and dominion, and of undue influence exercised, yet the Court said, "That Courts of Equity do not hold a deed made by a female child just of age to a parent, to be void on its face." In this case two of the Judges dissented.

The cases of Huguenin vs. Baseley; Hardy vs. Handy; Allore vs. Jewell; McCormick vs. Maline, are all cases of sale, accompanied by fraud, misrepresentation, inadequacy of consideration and mental desparity.

The case of Crowe vs. Ballard, 1 Vesey, Jr., 215, is one of prinpal and agent. Crowe, a young man in pecuniary distress, applies to Ballard to sell an expected legacy. The agent makes certain representations which prevents other parties from purchasing, and then purchases himself at a grossly inadequate price. This transaction is denounced by the Lord Chancellor as a rank fraud.

The case of McCormick vs. Malin, 5 Blackford, 509, is a case of a sale for a grossly inadequate price, under grossly fraudulent misrepresentations as to value.

We call the special attention of the Court to the able opinion of the learned Judge who tried this case, and especially to the impartial manner in which he discusses the whole evidence, giving due and proper weight to every part of it.

After a most patient hearing, and a clear, forcible and thorough analysis of all the evidence, and a most exhaustive consideration of the legal principles, and a careful inspection of all original documentary evidence, His Honor, Judge Speer, arrived at these conclusions of law and fact:

"*First.* Not only does the complainant fail to show such weakness of mind on the part of Ralston as will invalidate the deeds, but the evidence demonstrates that at the time they were made, he was abundantly capable to dispose of his property as he might think proper.

"Second. So far from indicating an abuse of influence or a betrayal of trust, the evidence amply shows that this disposition of the particular property, had been the long-settled and cherished purpose of Ralston's life, and it must stand as he intended."

In consideration of the fact that this case was tried in the city where Ralston was raised, and that the witnesses who testified on behalf of defendant as to Ralston's mental capacity, and his relation to Turpin, were the friends and companions of his youth and manhood, some of whom had slept and roomed with him—some were of the highest standing in the community—and in consideration of the fact that the witnesses who testified for the complainant were comparative strangers to Ralston, who lived a thousand miles away from Ralston's home, and who perhaps never saw him unless while drinking or recovering from the effects thereof, we think that this Court will attach more than usual weight to the conclusions reached by the learned and able Judge, and would naturally look to his opinion for the truth of the case, and will not disturb the decree, save for palpable error of law.

Summary of the Argument.

For the convenience of the Court the following summary of the argument is presented:

In reply to the charge that Ralston was mentally incapacitated to make a valid deed, the defendants allege:

1st. That the complainant fails to show such weakness of mind on the part of Ralston as will invalidate the deeds.

2d. That the evidence demonstrates that at the time the deeds were made he was abundantly capable to dispose of his property as he might think proper. The evidence is complete that when sober he was fully so capacitated; the fact is established that at the time of the execution of each of the deeds he was perfectly sober and perfectly rational.

3d. That the number of large and important transactions in which he was subsequently engaged as a principal contracting party in the making of deeds, mortgages, wills, agreements, &c., involving many thousand dollars, show that the complainant herself, as well as the other parties to these instruments, recognized that he was a sane man, responsible for his acts and capable of making binding contracts as to the most important property interests.

The review of the evidence in support of these propositions will be found in this brief, beginning on page 19 and ending on page 36.

On the subject of the undue influence on the part of Turpin, by which it was alleged that Ralston was induced against his will to execute the deeds, we reply:

1st. That the execution of the deeds was the voluntary act of Ralston, and was the consummation of his purpose to give to Turpin's family the enjoyment of all or a portion of his property after his death; which purpose was manifested by uniform public avowals of his intention and the execution of two wills in which this intent was maintained, the said avowals and the execution of the wills covering a period of eleven years next preceding the date of the execution of the first deed; which purpose is further manifested by the reasons assigned by him for the act after the signing of the deed, and his evident approval of the act always afterwards.

The review of the evidence in support of this proposition will be found in this brief, beginning on page 43 and ending on page 47.

2d. That the personal relations between the complainant and Ralston being considered, there was nothing unnatural in his devoting a portion of his property, after his death, to Turpin's family. That complainant was a public prostitute, the inmate of a bawdy house when Ralston first met her; that she continued after that to be at intervals the mistress of Ralston, and of other men; that after seven or eight years of such intercourse, Ralston and complainant were married. That both before and after marriage they were drinking and fighting with each other, and that their married life was turbulent and unhappy. See this brief, beginning at page 37 and ending page 42.

3d. That the personal relations between Turpin and Ralston were the sincerest affection each for the other—the earnest devotion and solicitude for Ralston's personal interests, on the part of Turpin, and the well founded personal esteem and confidence of Ralston in Turpin, as a man of integrity and business capacity. See this brief, from page 48 to page 53.

4th. That the business relations between Turpin and Ralston were simply that Turpin was the real estate agent of Ralston, renting out his property, collecting the rents and paying them over to Ralston, rendering him regular statements, and in all matters having no more authority over the property and its management than in the case of the property of other people whom he represented as a real estate agent. See this brief, from page 54 to page 61.

5th. That the testimony most conclusively demonstrates that Ralston, so far from being a man of weak will, was a man of remarkable strength of will, and not easily influenced. See this brief, from page 62 to page 68.

6th. That while Turpin possibly had influence with Ralston as to ordinary matters about which he (Ralston) was comparatively indifferent, he had no influence to control him in any matter against his will; and that no single instance is anywhere shown in the evidence where Turpin ever controlled Ralston against his will, although many instances are shown where he attempted to do so and failed. See this brief, from page 69 to page 76.

7th. That the execution of the deeds was the voluntary act of Ralston, in compliance with his long cherished and often avowed purpose; and that all the circumstances attending the execution of the several deeds and all that was said and done by Ralston, as well as by complainant, up to the date of Ralston's death, prove conclu-

sively that the act was the free and voluntary act of Ralston, approved by the complainant then and afterwards, and thoroughly understood and intended by both of them. See this brief, from page 77 to page 88.

8th. That Turpin made no misrepresentation as to the comparative value of the property embraced, and that not embraced, in the deed of gift. See this brief, pages 88 and 89.

9th. That the allegation that Turpin had and exercised undue influence over the complainant, is utterly unsupported by the evidence. See this brief, page 89.

10th. That the proof of his honesty and integrity, and of his loyality to every relation and obligation, which is disclosed in this record, establishes for Turpin a character which should weigh heavily in his favor in the determination of every doubtful fact in this case. See this brief, pages 90 and 91.

11th. There was no such confidential relation existing between Turpin and Ralston, at the time of this gift, by reason of which the law raises a presumption against its validity.

The class of confidential relations where the law raises such a presumption, is where the law presumes both confidence and dominion, as guardian and ward, &c.

There is another class of confidential relations where confidence is presumed—but not dominion—such as the relation existing between partners, principal and agent. In this class of cases the law raises no presumption against the validity of a gift by one partner to another, or against the validity of a gift by the principal to his agent.

Turpin had been Ralston's guardian, but this relation ceased and all accounts were settled in 1869, eleven years before the gift. Whatever dominion the law may have presumed that Turpin exercised over Ralston, by reason of having control of his person and property, is presumed to have ceased eleven years after the control ceased.

12th. If any relation of a confidential character existed at the time of the gift, it was that of principal and agent. The firm of Turpin & Ogden, (of which Turpin was a member) having been employed to rent out Ralston's property, in the City of Macon.

The law raises no presumption against the validity of a gift from the principal to the agent in cases of this kind.

In fact the only confidence the law presumes to exist between a real estate agent engaged in the general business of renting out pro-

perty and collecting rents and his customer—is that the customer has the right to presume that the agent will rent out his property to the best advantage—and faithfully collect and honestly pay over the amounts collected—as to any other dealings between the parties not connected with the business of the agency, the law presumes no confidence, and the parties stand towards each other as all other men—each looking out for himself.

13th. In all classes of confidential relations—the law does not prohibit gifts or other dealings between the parties.

14th. In all cases where there is a presumption against a gift, if the evidence shows that the same was freely and voluntarily made, the gift will stand.

15th Perfect confidence in one's integrity and capacity, and great personal friendship, instead of invalidating a gift, afford strong reason to support it.

From the foregoing, we deduce the following conclusions:

1st. That Ralston had the mental capacity to make a valid deed.

2d. That there was nothing in their personal or business relations which, under the law, prevented a valid deed of gift being made by Ralston to Turpin.

3. That there was nothing in their personal or business relations which, under the law, raised a presumption against the validity of a gift made by Ralston to Turpin.

4. That if such relations between them should raise such presumption against the validity of the gift, that presumption has been completely removed in this case, by the evidence, which shows that Turpin's conduct was fair, honest and *bona fide*, and that the execution of the deed was the voluntary act of Ralston, in accordance with the settled and cherished purpose of his life.

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Supreme Court of the United States.

OCTOBER TERM, 1888.

IDA RALSTON, *Appellant*,

vs.

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No. 98.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA WESTERN DIVISION.

Supplemental Brief of Solicitors for Appellees in Reply to Brief of Solicitors for Appellant.

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The exemplification of the record from the Surrogate's Court, of New York, was properly excluded:

1st. It was not competent evidence to prove the incapacity of Ralston to make a will, for the reason that none of the defendants were parties thereto; and further, that it is shown upon the face of the record to have been a collusive and fraudulent judgment, as appears by the facts, that it was offered for probate, where the record shows Ralston had no property; that the pretended propounder stated in her petition that Mrs. Laura R. Smith was the heir-at-

law, and the only heir-at-law of Ralston, which the record shows to be utterly untrue ; that the said Mrs. Laura R. Smith, although having no possible interest in the estate, appeared and resisted the probate of the will, and that the pretended propounder made no effort to probate the will.

2d. It was not pertinent in this case to prove either that Ralston died intestate, or to establish the proposition that the executors named in the will were not proper parties to the bill. There was no contention that said named executors were proper parties to the bill, nor was there any denial of complainant's right to file the bill. The demurrer setting up these defenses had been formally withdrawn before the answer was filed. Complainant enjoyed every right in this litigation to which the proof would have entitled her.

The testimony of Dr. Wylie is not correctly stated in appellant's brief, page 4. There is no evidence for the statement that he is "one of the most eminent physicians in the city of New York." He does not say that Ralston, "when sober, was mentally incompetent." On the contrary, he testifies distinctly, that he "saw him when he needed a doctor." (Transcript, page 112.) Dr. Wylie's answer to the 8th direct interrogatory, at bottom of page 112 of the transcript, shows that he was not a careful witness in what he swore to. He did not know personally anything about Ralston's property, and could not have known whether he overestimated or underestimated any portion of it.

3d. The statute of the State of Georgia has no ap-

plication to the case, except so far as the section of the code is an embodiment of the general law as to parties holding confidential relations. A deed conveying real property must conform to the requisites of the State where the property is situated. But the question of the manner in which a party was procured to make a deed is not influenced by a statute of the State where the transaction did not occur, and of which the party making the deed was not even a citizen. This applies also, and more particularly to sections 2666 of the Code of Georgia, cited in Appellant's brief, page 7.

4th. The questions of the relations between Turpin and Ralston have been discussed in Appellee's original brief from page 48 to 61, on the subject of their personal and business relations, and also from page 69 to 76, on the subject of Turpin's influence over Ralston. The confidence of Ralston in Turpin was the confidence in the integrity and capacity of Turpin which appealed to his judgment. There were none of the elements of that kind of confidence which involves a surrender of the will and action to the control of another. The influence of Turpin never extended to a control of Ralston in any single instance against his will. He esteemed him as a father, and loved him as a father, but there was none of the control of the father or the submission of the son.

5th. The preparation of the deed before Turpin went to Stamford, to be considered in connection with the fact that Ralston had for twelve years previous, announced, time without number, that he intended to leave all of his property, or a large portion of it, to Turpin's family, and that he had made two

wills, leaving to his children about half his property, in the last of which he had specified the identical property embraced in the deed. The circumstances of the visit to Stamford, the interview with Ralston and complainant, and the execution of the several deeds are discussed in Appellee's original brief from page 77 to 88, on the subject of "the particular inducement which caused Ralston to execute the deed." The evidence, there discussed, shows that Ogden went to Stamford to visit relatives and also by special invitation of Ralston; that Ogden having to return soon to New York, Ralston, at his own suggestion, went to the hotel after him, carried him to his house to dinner and asked him to go to Bridgeport with him; that Turpin made no suggestion relative to the matter; that Ogden did go, and returned to New York that evening. This is shown by the evidence of Ogden and also of Turpin. In both his testimony and in his sworn answer, Turpin denies that he had any thought of surveillance over Ralston, and complainant, until these deeds were signed; and there is absolutely no evidence to that effect.

There is no evidence, as stated in appellant's brief, that Turpin claimed that Ralston had made a promise to his "*mother on her death bed.*" There is, literally, not a word of evidence to that effect, and it is not true, in point of fact, that any such promise was made by Ralston to her on her death bed; nor was any such representation made to Ralston by any one. Complainant, in her sworn bill, did not say that Turpin said anything to Ralston about his mother. Turpin, in his sworn answer and in his testimony, states a different thing as having been said by him on that occasion.

Turpin does deny explicitly, in his sworn answer, that he made any comparison as to the value of the property deeded with that not deeded (Transcript, page 27), and he avers that Ralston knew as much about the value of his property as he did. In his testimony, he only varies it to the extent of saying that he has no recollection of having done so. In her sworn bill, complainant says Turpin said that the property deeded was worth less than "the other property" of Ralston not deeded. (Transcript, page 4.) In her testimony, she says the comparison he instituted was between the Cherry-street property and the 3d-street property.

It was proper for Turpin to inform Ralston that his marriage had revoked his former will. The question of the comparative value of the different portions of Ralston's property is discussed in the original brief of appellee's, page 88.

As to citation of remark of Lord Eldon in 15th Vesey Jr., 340, see subsequent comment in this supplemental brief on that case. (*Harris* vs. *Treemanheere.*)

The evidence shows that it was fully explained to Ralston that the paper was a "*deed of gift.*" The complainant says this in her sworn bill. (Transcript, page 4). Turpin's sworn answer and his testimony are explicit on this point. It is not to be presumed that Ralston did not know that a deed is irrevocable. The record shows that he had made deeds to valuable property before that date, and there is no ground on which to presume that he did not know this ordinary and most generally-known feature of a deed. He made important deeds afterwards, and at no time

did he ever disclose that he was ignorant of the fact that a deed is irrevocable. Many comparatively well-informed people are probably ignorant of the rule of law that marriage revokes a former will; but even the illiterate know that a deed is final and irrevocable. The ruling of Lord Eldon in *Huguenier* vs. *Basely*, is not correctly stated by appellant's counsel in this connection.

Appellant is incorrect in stating, in effect, that "counsel for Mr. Turpin" was, during nine months, uncertain whether the instruments were deeds or testamentary in their character. There is no such evidence. When counsel was shown the deed of August 28th, 1880, he said, "there was an informality in it," and there is not a word of testimony to the effect that he ever regarded the paper as in any manner testamentary. (Transcript, page 210.) This counsel was also the counsel of Ralston, and had been such, as shown by the record, before he ever represented Turpin; and he charged no fee for services in the matter.

One of the "informalities" in the deed of August 28th, 1880, was that it gave Turpin, trustee, the right of immediate possession, which was evidently not the design of either party. This, in the deed of April 19th, 1881, was corrected in Ralston's interest.

As to prospect of children from the marriage, see original brief of appellees, page 42.

Ralston's aunts had never been sufficiently the objects of his solicitude to induce him to contemplate making them the objects of his bounty, excepting at one time, in the case of Mrs. Smith, and she had been left out of the will of 1879.

As will be hereafter shown, the deeds of August 26th and August 28th, 1880, were both valid deeds

under the law of Georgia, where the property is situated. The correction of "informalities" in no manner changed the rights of the parties; and, therefore, the failure to explain them to Ralston did not in any manner affect Ralston.

Where the donee is proven by other facts to have a controlling influence over the donor, then the execution of a number of deeds may be, as said by Lord Wilmot, a still stronger evidence of the controlling influence. But in the absence of any proof by other facts of such controlling influence, the execution of a number of deeds to effect a given purpose must be strong evidence of a voluntary intent on the part of the donor.

The important element is the origin of the intent to donate. If this is clearly shown to have originated freely with the donor, the suggestion of the particular form or mode by which that intent shall be carried into effect is comparatively unimportant. Ralston's well defined intent was to give this property, to be enjoyed by Turpin's children after his death, reserving to himself all the enjoyment of the same during his life. This intent would be carried out either by a will or by a deed of the kind executed. The only difference is in the feature of revocation. As Ralston never changed his intent, and never by any word or act expressed a desire to revoke the deed, this difference was neither practical nor important. It was his right to make an irrevocable deed, if he wished it, when it was seen by him that it would accomplish the same purpose as would the will—give him the full enjoyment of the property during his life, and the same to Turpin's children after his death. The simple question is: Was it

his voluntary act, in accordance with his long expressed intent?

To answer this, we refer to the discussion of the subject in the original brief of appellees, beginning on page 77. Turpin had every reason to believe, when he went to Stamford, that Ralston still desired to give the property to his children, and that the will of December, 1879, had been executed by him for that purpose. He swears, in his answer, (Transcript, page 26,) that before enquiring about his willingness to sign the deed, he asked him if it still was his wish for his (Turpin's) children to have the property; to which Ralston promptly replied in the affirmative. His testimony is substantially to the same effect.

The complainant, in her sworn bill, says that Ralston "*readily consented to sign the said deed of gift.*" If it had been an imposition or a fraud upon him and complainant, by which they had been overreached and their wills subornated, or in any manner unduly influenced, there would have been heard before Ralston's death, either from himself or from the complainant, some expression or hint of the fact and dissatisfaction thereat.

Turpin's sworn answer is evidence in this case, and every allegation made by him therein, which is responsive to the allegations in the bill, must be taken as conclusive of the fact so alleged, unless contradicted in the manner required.

In *Conley* vs. *Nailor*. 118 U. S., page 127, the court held that where the complainant "neither demands nor waives an answer under oath, and the respondent answers under oath, the answer is evidence

on behalf of the respondent, conclusive unless contradicted."

In her bill the complainant neither demanded nor waived an answer under oath from the respondents. She demanded an answer, but did not say whether it should be under oath. The only waiver made in the original bill is found on page 8 of the transcript, and is as follows: "Your oratrix expressly waiving all discovery from each and all the said defendants."

The general rule in equity is, and always has been, that when the complainant brings a defendant into court by a bill in equity, such defendant is entitled to have his answer to the allegations in the bill accepted as evidence by the court, unless he is deprived of that right by some special rule.

If the complainant seeks to deprive the defendant of such right by virtue of a rule of court, there must be a strict compliance with the requirements which that rule lays on the complainant.

If the complainant had, even in her bill, "waived discovery" of the defendants, *under oath*, it would not have been such a compliance with the rule, as embodied in the amendment to the 41st rule of this court, as would have deprived an answer under oath of its character as evidence for the respondent.

A waiver of discovery is not a waiver of an answer. An answer is not necessarily discovery, and discovery, so far from being synonomous with answer, is not even a necessary feature in an answer. It follows that a waiver "of discovery," is not a waiver of answer either under oath or not under oath.

There having been in complainant's bill no waiver of answer under oath from the defendant, his answer

was properly filed under oath, and is evidence in his behalf. It was not only his privilege, but his duty to answer under oath. The court, in the above-cited case, on page 134 of 118 U. S., says:

"The answer, though not called for under oath, is evidence in behalf of the defendant. For if a plaintiff in equity is unwilling that the answer should be evidence against him, he must expressly waive the oath of the defendant in his bill. See amendment to 41st Equity Rule. If he fails to do this, the answer must be given under oath, and is evidence."

On the 6th day of May, 1884, the complainant filed an amendment to her original bill (Transcript, page 22) in which there was no waiver of answer under oath, and no waiver of any kind.

The answer of Turpin, trustee, to the original bill and first amendment, was filed July 11th, 1884. (Transcript, page 23.)

On the 29th day of May, 1885, the complainant filed a second amendment to the bill (Transcript, page 47) in which there was no waiver of answer under oath and no waiver of any kind.

On the 12th day of June, 1885, the complainant filed a third amendment to her bill (Transcript, page 49) in which there was no waiver of answer under oath, and no waiver of any kind.

On the 16th day of June, 1885, defendant Turpin, trustee, filed his answer under oath to the foregoing second and third amendments to the bill. (Transcript, page 59.)

On the 6th day of July, 1885, the complainant filed an amendment to the amendments by which she "amends the amendments" "by waiving sworn

answer from said defendants to each and every and all of said amendments. (Transcript, page 59.)

This last is the first waiver of any answer under oath from the defendant, and that was only a waiver of answer under oath to the amendments; and the record shows it was filed after the defendant had filed his sworn answer to the amendments.

The sworn answers of Turpin to the bill and the amendments, expressly deny every material allegation in complainant's bill on which rest the charges of fraud and undue influence, and an examination of the testimony shows that every such charge in this case depends for its support upon the sole and uncorroborated testimony of the complainant.

The Deeds of August 26th and August 28th, 1880, were valid deeds and not testamentary in their character.

Counsel for Appellant insists that the first two deeds were testamentary in character; and in support of this proposition refers to 62 Ga., 627, and 41 Ga., 212. Justice Bleckley (at present the Chief Justice), who delivered the opinion of Court in 62 Ga., said:

"The instrument of 1876 is testamentary in its nature, and not a deed. Its character is determined by the time when it was designed by the maker to take effect, and that time is expressly declared in the instrument itself. The following language is decisive: 'But immediately on his death this transfer is to take effect, and the transfer and delivery so intended to be perfected and completed.'"

In 41 Ga., 212, the other case cited, the paper be-

fore the Court was as follows: "I give and devise unto them (his three sons) all of my estate, both real and personal, consisting of lands, money, and evidences of debt, horses, cattle, and hogs, and all other stock of all descriptions that I may *die possessed of*, to them, and their heirs."

The Court held this was a testamentary paper and not a deed. That it was not intended to take effect before death; that it could not take effect "in presenti," as it related to such property as he might "die possessed of."

When the following decisions of the Supreme Court of Georgia are examined, it will be seen that there can be no doubt that the first two instruments executed by Ralston were deeds, and not testamentary in character.

In 31 Georgia, 720, the language was: "I do give, grant and convey" (certain property). In the next clause these words occur: "To have and to hold after my death the aforesaid property," &c. The court held:

"That in the first clause there is a clear gift in *presenti;* that the words '*after my death*,' in the habendum, may be construed into a postponement of possession and enjoyment by the donees until the donor's death, or a reservation of an estate for his life, and thus reconciled with the prior gift in *presenti:* that if the two clauses conflict, the first must prevail, and that in either view the instrument is a deed and not a testamentary paper." (See reasoning of Court.)

In 56 Ga., 513, the paper was as follows:

"This indenture, made this January 6, 1872, be-

tween William H., &c., and his daughter Mary, witnesseth that the said William H., for the love and affection he has for said Mary, has given and granted (certain property) to have and to hold the aforesaid premises after his death during her natural life. The said William reserves the right of controlling the afore-mentioned premises as long as he lives. The said William H. desires the afore-mentioned premises at the death of the said Mary, be sold and divided between the balance of his children."

This was held to be a deed.

Judge Bleckley said:

"It is not easy to say what this instrument is. It has the form and general requisites of a deed, including attestation. Construed as a deed, it would have validity and take effect; construed as a will, it would be a nullity, as it has but two witnesses, and the law requires three. We do not certainly know what it is. Its construction is very doubtful. Taking all its terms together, it would seem that the grantor intended to pass something presently, for he defines what it was his purpose to reserve, namely: the control during his own life. By control, he most probably meant possession, use and enjoyment; not absolute, with power of disposition beyond the term of his own life. To hold the instrument to be a will, would be to make the reservation altogether idle and useless. By holding it to be a deed, effect can be given to the reservation, as a part of the instrument, to all the words, without rejecting any as superfluous. This, we think, is the safer and better construction."

In 22 Ga., 472, the paper in substance was as follows:

This indenture made this April 1, '45, between C. Bunn and M. Bunn, witnesseth: that C. Bunn for love of her son, M. B., and five dollars in hand paid

by him, has given and granted, &c., to M. B., certain property; and that she reserves to herself her right to said property during her life; and that after her death said M. B. is to have and to hold the said property to him, his heirs and assigns forever in fee-simple; and that she warrants the property to said M. B., &c.

Held, that this instrument was not a will, but was a deed.

Judge Benning, in delivering the opinion of the court, refers to the decision in *Watson* vs. *Watson*, 22 Ga., 460, where a somewhat similar instrument was held to be a deed. In which latter case the court says, Judge Benning himself delivering the opinion: "whether an instrument is to take effect before the death of its maker, or not until afterwards, depends on his intention."

The court further says, the words of an instrument are what we are mainly to regard in seeking for intention; the form of this instrument may help to indicate the intention; where the words and form both point the same way, there can be no doubt as to the intention. The words "have given, granted, bargained, sold, and by these presents do give, grant, bargain and sell, express a gift to arise immediately on their utterance. They are words which do this with emphasis, when preceded by such words as the following, 'and also in consideration of the sum of ten dollars to me in hand paid at and before the sealing and delivering hereof, the receipt whereof I do hereby acknowledge,' and when followed by such words as these, 'to have and to hold all and singular, the property herein given and granted unto &c., forever as their own property.'"

The form of the instrument is that of a deed. It has all the features appropriate to a deed, and not features appropriate to a will. Consulting the words, they show it was the intention of the maker that it should take effect before his death. The words and the form then concur in saying that this was his intention. A part of the words would be absurd and void, if this was not his intention. We think therefore that the instrument was not a will, but was a deed.

See *Youngblood* vs. *Youngblood*, 614 Ga.

If the instruments, discussed in the above decisions are deeds—applying the same principles to the first two deeds,—how irresistible is the conclusion that they are not testamentary in their character, but that they are deeds, conveying a present interest.

The deed of Aug. 28, 1880, does not even postpone the right to possession.

ABSTRACTS OF, AND EXTRACTS FROM, THE PRINCIPAL CASES CITED BY BOTH APPELLANT AND APPELLEES.

In the case of *Hylton* vs. *Hylton*, 2 Vesey, Sr., (547, decided by Lord Chancellor Hardwicke, in 1754), the defendant was the uncle of plaintiff, an orphan, and his guardian, also executor and trustee in both wills, that left plaintiff considerable property. At the time of settling the accounts, a short time after plaintiff became of age, he granted his guardian an annuity of £60.

Lord Hardwicke said, when a man acts as guardian for an *infant*, the court is extremely watchful to prevent that person taking any advantage immediately upon his ward coming of age, and at the time of settling accounts or delivering up the trust; because an undue advantage may be taken. "That is the very time at which there is the best opportunity to take the advantage of getting such a bounty as this; for at that very time, the estate is to be accounted for and delivered up. The thing speaks for itself. '*I will not deliver up the estate you are entitled to and account, unless you grant me this.*' Besides, it appears to be a previous design of the defendant, and that he stipulated and haggled for that annuity at that very time, when a trustee should avoid it."

"Undoubtedly, if after the ward or *cestui que trust*

comes of age, and after actually put into possession of the estate, he thinks fit, when *sui juris*, and at liberty, to grant that or any other reasonable grant by way of reward for care and trouble, when done with eyes open, the court could never set that aside; but the court guards against doing it at the very time of accounting and delivering up the estate as the terms, for the court will not suffer them to make that the terms of doing their duty. This case therefore is within those general principles."

Crowe vs. *Ballard*, 1 Vesey, Jr., side page 215, (decided by Lord Chancellor Thurlow, in 1790), is a case where Crowe, a young man in pecuniary distress, applies through his tutor, and then by himself to Ballard to sell an expected legacy. He represents to the young man that the purchase of the legacy will be an exceedingly hazardous adventure, and makes the same representation to all persons to whom, in behalf of the young man, he offers to sell it. In consequence nobody will buy it, and he then buys it himself at a very grossly inadequate price.

The transaction is denounced by Lord Thurlow, who says that it deserves no other name than a rank fraud.

The case of *Hatch* vs. *Hatch* in 9th Vesey, 292, was (decided by Lord Eldon in 1804.) The plaintiff, Mrs. Hatch, at the age of fonr years. upon the death of her father, became seized in fee of the manor and rectory of Sutton. The former, worth about 15,000 pounds, the latter about 200 pounds a year, capable of improvement. Giles Hatch the defendant, who had married her sister, was her guardian. She lived with him until her marriage; and he received 130 pounds a year for her maintenance. The rectory becoming vacant during her minority, Giles Hatch

was presented. In October, 1779, she became of age, and on 20th of January, 1780, she executed a conveyance of the advowson of Sutton to Giles Hatch, for love and affection, and for the care taken of her by him. There was no settlement of accounts until December 11th, 1780. The bill charged fraud in procuring the conveyance, that she was very deaf and only intended to grant the next presentation. Lord Eldon said the evidence showed this lady so deaf that she could only be conversed with by means of the fingers. This imposed upon the guardian duty of giving full information. That the guardian knew the actual value of the advowson, and its improveable nature and quality. It is not like the conveyance of an estate yielding a certain rent. This is property of such a nature that one party may be fully acquainted with the value, and no one else can have any correct information upon it except from that person. Is there any pretense for saying a girl just twenty-one knew anything of the value.

"There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if a trustee, having done his duty, the *cestui que-trust* taking it into his fair, serious and well informed consideration, were to do an act of bounty like this. But the court can not permit; except quite satisfied that the act is of that nature."

In this case it appears, as stated by Lord Eldon, that the—

"Connection was not dissolved, the account not settled, everything remaining pressing upon the mind of the party under the care of the guardian."

This conveyance was drawn by the solicitor and brother of Giles Hatch.

The decision cancelling the deed is on the grounds that it was made by the ward within three months after coming to age, while still living with her guardian, and eleven months before the settlement of his accounts. Further, that the conveyance was procured by fraudulent misrepresentation as to value, and deceit as to the quantity of the estate conveyed. In such a case the burden rested heavily on the guardian to prove the contrary.

The case of *Huguenin* vs *Baseley*, 14 Vesey, Jr., 273 (decided by Lord Chancellor Eldon in 1807) was where a conveyance of certain property was made by a widow to a clergyman for an annuity of four hundred pounds. The instrument was a complicated trust deed to run for a term of five hundred years, with estates for life and entail, and with remainders, cross-remainders, &c.

The Lord Chancellor, in his opinion, recites (see page 292) that the complainant, then but a short time a widow, was "in alarm" at the trouble of taking possession of an estate—dilapidated. She was about forty years of age and had but recently become acquainted with the clergyman, Baseley. That previously to her acquaintance with Baseley, she was entirely satisfied with the management of her concerns by her then solicitors; that shortly after acquaintance with Basely, it is charged that the latter "infused into her mind great dissatisfaction with the management and want of professional skill and care of those solicitors." And thereupon, the Lord Chancellor says (page 292): "The inference that this

dissatisfaction was created in her mind by Baseley is too strong;" "that he participated in and acted upon it with her is clearly established." As the result of that dissatisfaction, it is shown that she wrote and signed a letter to her solicitors stating that Providence had raised her up a friend, in the person of Mr. Baseley, for the entire management of her affairs, and directing them to deliver to Baseley at once all of her papers, and to account to him for all matters of hers in their hands; that this letter was originally written by Baseley and then copied off and signed by the complainant; that thereafter Basely artfully dissuaded the complainant from residing on the estate and letting the same as she proposed; that he recommended to her a certain surveyor who gave a very unfavorable account of the estate; that soon thereafter Baseley procured the execution of the conveyance for the annuity of four hundred pounds, worth at the time at the lowest calculation four hundred and twenty pounds, and when another party was seeking to purchase it at a valuation of six hundred and ten pounds a year. It is further shown that at the same time another deed was executed by the complainant placing all of the rest of her large property beyond her own management and control, and with the creation of certain estates, and with ultimate remainder to Basely and two other persons.

At the time of the execution of these instruments, the complainant had living a mother, a daughter, and a half brother.

Notwithstanding the remarkable and unnatural character of these conveyances, Lord Eldon, said

they must stand "if they are the pure, voluntary, well understood acts of her mind."

Lord Eldon reviews the evidence at length and examines critically, the technical effects of the intricate conveyances, and concludes—

1st. That the complainant was induced by deceitful and artful practices of Basely to become dissatisfied with the management of her brother-in-law, and of her solicitors, and by like means on the part of Basely to place the management and control in his own hands.

2nd. That by fraudulent and deceitful means, he caused her to be misinformed and deceived as to the real value of her property.

3rd. That by the designed use of undue influence and by the abuse of the confidence she had reposed in him, he procured her execution of the conveyances.

4th. That under the evidence he is satisfied that neither the complainant nor any of the parties understood the legal effect of the intricate and complicated conveyances.

Lord Eldon in this case, says, the question is "how the intention was produced."

It is important to note that the bill was filed by the party alleged to have been defrauded, and that she herself charged that she had been defrauded, deceived, and duped by Basely.

In the case of *Harris* vs. *Tremenheere* 15 Vesey., p. 34, (decided in 1808 by Lord Eldon) the widow and children of Harris filed their bill against the defendant Tremenheere to set aside several leases ob-

tained by defendant from Harris the husband and father of complainants. The bill alleged that Harris, in a great degree, was unacquainted with business, and that the defendant, being an attorney, took advantage of these circumstances, and prevailed upon Harris to appoint him to the stewardship, and general management of his affairs. That defendant had obtained great influence over Harris by means of which he induced him to grant these leases.

Lord Eldon said:

"The defendant stood in the character of agent and attorney to this gentleman; and in that character must be bound by a due application of all the principles of this Court, which upon grounds of public policy affect that relation? The defendant, being the steward, agent and attorney of the testator (Harris), at the same time stood in relation to him, that furnished *considerations* of *kindness* as well as justice.

Some of these leases were gifts, and Lord Eldon said as to these:

"I have no jurisdiction authorizing me to set aside such a transaction, or to hold under these circumstances, if he thought proper, he should not make such a disposition as this. * * * I cannot find any decision authorizing me to say that the defendant should not have taken these leases, as of the pure gift of his employer. I am quite ready to say, that, if I could find in the answer or evidence the slightest hint, that the defendant laid before the testator any account of the value of the premises, that was not perfectly accurate, that would induce me to set them aside, whatever the parties intend, upon the general ground, that the principal never would be safe, if the agent could take a gift from him upon a repre-

sentation that was not most accurate and precise. There is no evidence of misrepresentation, circumvention, or any thing, improperly leading the testator to make these leases; that they were not the spontaneous fruit of his own generosity; not weighing *the value or amount of consideration*, that should have been given, if it had been *the subject of barter.*"

Counsel for appellant cites in his brief the statement of Lord Eldon as to what he would have been induced to do had certain facts appeared, &c. In this Lord Eldon can only be construed to mean that he would set aside the conveyance, if he could find that the agent had intentionally made any misrepresentation of value to his principal, even if it were slight,—for instance if he had represented the amount of rent received from the property, he must be precise, as that would be capable of exact and accurate statement; or if, on the other hand, he expressed an opinion as to value, it must be an honest opinion. If the misrepresentation as to value were intentional, under the rule laid down by Lord Eldon, the deed would be set aside, even if the misrepresentation did not induce the gift. On the other hand, if the misrepresentation was unintentional and honestly made, especially in a matter of opinion, the gift would not be set aside, unless such misrepresentation was the cause of the gift. The principle laid down in all the leading cases and by all the text writers, is that the law presumes that the principal has confidence in the agent, and therefore when the principal deals with agent as to any matter connected with the agency, it is the duty of the agent to disclose any fact relating to the subject matter of the transaction, within his knowledge, not known to

the principal, or if the agent undertakes to make any statements or express any opinions with reference thereto, he must be perfectly honest and candid in every thing he says. The only inquiry the court will make is whether under all the facts in the case before it, the "confidence has been abused."

Lord Eldon further said, as to the leases for value, as it appeared that the defendant had departed from the general principle that had governed him, to wit: "That it was not for the interest of the testator to grant any reversionary lease upon one life; that life being above the age of sixty," and as the court was not satisfied that a full value was paid for these leases, an inquiry was directed as to their value, &c.

The case of *Hunter* vs. *Atkins*, decided by Lord Chancellor Brougham, 3 Mylne & Keene, page 113, is fully set out and discussed in Appellees original brief, beginning on page 97.

The case of *Taylor* vs. *Taylor*, 8th Howard, 183, is one where the deed was made by a young girl to a trustee for the benefit of her immediate family. The court, in the opinion, discuss the evidence, and base the judgment upon the following facts which are recognized as having been proven: That the deed was founded upon no real consideration; that it was executed within a few months after she became of age, and whilst she was still living with her parents; that it was extorted from her by false representations, both as to her filial duties, and as to her right to retain and enjoy this property which had been bequeathed to her by her uncle to the exclusion of the

other members of the family; that to procure the execution of the deed, she was subjected to extreme urgency and harsh treatment on the part of her parents, who, for this purpose, further held out the hope that, by a compliance with their importunities in this regard, they would be reconciled to a marriage which she desired, and which they had theretofore opposed.

In this case, it is to be noted that the bill was filed by the party alleged to have been defrauded, and that she, herself, charged that she had been deceived, and coerced into making the deed.

Two Judges dissented from the judgment and decree, cancelling the deed.

Allore vs. *Jewell*, 94 U. S., 506, is a case where an old woman, imbeciled to a point but one degree removed from insanity, was induced by artful practices and undue influence thereby obtained, to make a conveyance of property for a grossly inadequate price. The old woman was in her last sickness, living alone in a very forlorn and helpless condition; and pending the effort to get the conveyance from her, the agent of the purchaser was told by her physician that, in his opinion, she could not recover, and that she was not mentally capacitated to make a proper deed. She understood English imperfectly, and had no one with whom to advise. The property was then worth from $6,000 to $8,000; and the defendant, with every reason to know she was about to die, purchased it from her for $250, and an annuity of $500 during the remainder of her life; with an agreement to pay her physician's bill and the taxes

during the remainder of her life. The $250 was paid, but nothing else, and she died a few weeks afterwards.

The decision is put on the ground that the evidence showed great weakness of mind, with incapacity to judge of the nature of the transaction, and a grossly inadequate consideration.

Uhlich vs. *Mulke, et al*, 61st Ill., 499, is a case where a man of advanced years and alleged mental imbecility gave to his confidential agent, who had the entire management of his business affairs, one undivided third of his real estate, valued at $125.000. His wife joined in the making of the deed of conveyance. The defendant Mulke accompanied Uhlich the grantor and his wife to the lawyer's office, where the deed was drawn, but was not present in the office while the deed was being prepared, but returned and assisted in the explanation of the location of the property, and was present at the time of the execution of the deed.

The court decided that under the evidence the deed was the voluntary act of Uhlich, and that he was mentally capaciated to make the same; that no undue influence was shown on the part of Mulke, and that the burden of proving the undue influence rested on the complainant; and that the confidence and friendship and gratitude of the grantor relative to the grantee, so far from being a bar to the bestowal of this bounty were a proper inducement for the same. That otherwise "kindness, important services, and friendship to the distressed, would be under a legal ban."

See extract from decision in this case, set out in Appellant's original brief, page 100.

McCormick vs. *Malin et al*, 5 Blackford, 509, is a case of a sale of a legacy for a grossly inadequate price, under grossly fraudulent misrepresentations as to value, and under representations of fact proven beyond dispute to have been knowingly and intentionally false, as well as other known and designed misrepresentations.

The court, in a review, of the evidence declares that the relation of principal and agent existed between the parties as to the collection of this legacy. The purchaser desiring to purchase, represented to the legatee, who was a man of infirm mind from dissipation, that his share in an estate was not worth $6000, and doubted whether it was worth five thousand dollars ($5000), when in truth it was worth more than $13,000. He further stated that the executor of the estate had told him that it was doubtful if the legacy was worth $5000, which was false. It was stated by the court, as a proven fact, that the purchaser had falsely endeavored to produce in the mind of the legatee the impression that the executors were dishonest men who would give him trouble in getting his legacy, when, says the court, "there was not the slightest ground for imputation."

The purchaser had represented to the legatee that he would not get his legacy in eighteen months, whereas the purchaser previous to this statement had been told by the executor that the estate would soon be closed up.

By these, and other false and fraudulent misrepresentations, the purchaser succeeded in purchasing

from the legatee his legacy for $4,500, and within four months after the bargain, he received more than $13,000 on the legacy.

The purchaser was a shrewd business man of wealth, while the legatee was a man of natural unsound judgment, weakened by dissipation.

In addition to the grossly fraudulent and false representations shown in the case, as well as the gross inadequacy of price, the court finds, under an examination of the evidence, that while Malin accepted ostensibly an agency in regard to collecting the legacy, he, at the same time, entertained the purpose to purchase it.

It is to be noted that the bill is filed by the party alleged to have been defrauded, and that he, himself, charges that he was duped, deceived and defrauded.

The case of *Wright* vs. *Proud*, decided in 13 Vesey, Jr., 136, is one, in which a young man who had been for some time previously the inmate of an insane asylum, as a lunatic patient, was procured to make a deed in favor of the keeper of said asylum, while still remaining at the asylum, although nominally as a boarder.

The case of *Conley* vs. *Nailor*, 118 U. S., R., 127, is so similar in many respects to the case at bar,—and the discussion of the testimony on the subject of mental incapacity, and the conclusions reached by the court, is such a conclusive reply to the argument of the counsel for appellant, that for the convenient reference of the court, we take the liberty to make an abstract of the same.

This was a bill filed by the widow of Nailor and three of the heirs against the defendant, Catharine Conley, to set aside certain deeds made to defendant on the grounds of mental incapacity and undue influence. Nailor for many years prior to 1869, and at least as early as 1854, had led a dissolute and intemperate life. In 1869 he met defendant. There is no proof prior to that time that she was not a virtuous woman. In November, 1869, Nailor left his family and lived with defendant in concubinage until his death. One deed was made in 1872, and three in 1878. Nailor died in January, 1879. The court said there is a large mass of evidence introduced to prove that, from a long course of dissolute and intemperate habits, Nailor had become insane and incapable of transacting his business. * * * But there are some striking facts which should be stated. Of the forty-three witnesses for the plaintiffs who testify in regard to the mental capacity of Nailor, thirty-three give their opinion from having seen him while drunk. Of these thirty-three, eighteen swear they never saw him sober; three, that they never saw him sober but once, and twelve, that they seldom saw him when not intoxicated; six other of the forty-three witnesses speak of him as incompetent to transact business when he had been drinking; only four witnesses testify that he was incapable of doing business when sober. One of the complainants testified, that Nailor, his father, was not mentally competent to make a valid deed, when he executed the deed of 1872, and the deeds of 1878, yet he took a lease to certain property from his father during the last year of his life.

The court further say:

"The question to be decided is not whether Nailor had mental capacity to make a conveyance when he was intoxicated, but whether he was competent when sober—and whether he was sober when he executed them."

The testimony showed that although Nailor was habitually intemperate, he was often sober. The discrepancy between the witnesses, can, in a large degree, be reconciled, that some gave their opinions of Nailor's capacity when drunk. The court held that, although Nailor for many years before his death had been dissolute and intemperate, and during the last seven or eight years of his health had gradually failed, yet he was competent to make these deeds and to understand their effect. For, if Nailor was competent to make the deeds when sober, plaintiffs must show he was not sober when the deeds were made, and this they have failed to do.

The Court discuss *Harding* vs. *Handy*, 11 Wheat., 103, and *Allore* vs. *Jewell*, 94 U. S., 506, and say they do not control a case like this, and lay down this general rule.

"In equity, each case to set aside a deed for incapacity of the grantor, or intoxication at the time of execution amounting to incapacity, must be decided on its own merits, without regard to previous decisions in cases differing in the facts.

On the ground of undue influence the court, says:

"The undue influence for which a will or deed will be annulled must be such as that the party

making it has no free will, but stands *in vinculis*.

"It must amount to force or coercion, destroying free agency."

"Conceding that when a will or deed is made, while the parties are living in illegal sexual relations, is open to suspicion of fraud and undue influence, the plaintiffs have failed by any testimony whatever to show that the deeds in question were procured by either."

What the court said in *Conley* vs. *Nailor*, on the subject of mental incapacity, is so apparent, in its application to the case at bar, that it needs no elaboration.

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